

No. 68519-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS

Appellant,
v.

THE SEATTLE SCHOOL DISTRICT

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

BRIEF OF APPELLANT

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I. INTRODUCTION

Mr. John Cummings (*hereinafter* “*Mr. Cummings*”) was nonrenewed from his teaching position with Seattle Public Schools (*hereinafter* “*the District*”). The Hearing Officer erroneously found that the District had sufficient cause to nonrenew his teaching contract, after making several prejudicial procedural errors which prevented Mr. Cummings from receiving the substantive and procedural due process inherent in RCW 28A.405.310, the statutory scheme which governs teacher nonrenewal hearings. In addition to the procedural irregularities, several factors require this Court to hold that the District did not meet its burden of proof.

Mr. Cummings is an experienced and gifted special education teacher. In 2009, after three years of successful teaching with the District, Mr. Cummings was assigned to a new program and, after school began, he was assigned to teach a new curriculum that he had no opportunity to prepare to teach. Not only did the District fail to accommodate his ADHD, but the new assignment and new curriculum were more challenging for him because of it. Then, he was placed on probation in January 2010 at the time when he was teaching general education classes, that he was not endorsed to teach. He was placed on probation for his teaching of curriculum he was

asked to teach but was not consistent with the IEPs¹ of his special education students. The Hearing Officer erred by basing his Memorandum Opinion (*hereinafter* "Opinion") in part on Mr. Cummings' performance in classes he was not endorsed to teach.

Assistant Principal, Ms. Keisha Scarlett (*hereinafter* "Ms. Scarlett"), Mr. Cummings' primary evaluator and math coach, was inexperienced, biased against him and compromised because of her dual role as coach and evaluator. Ms. Marilyn Day (*hereinafter* "Ms. Day"), former District Principal, hired by the District as Mr. Cummings' second evaluator, evaluated his teaching and recommended that his teaching contract be renewed for the 2010-11 school year. However, her professional opinion was not considered by other District management officials who recommended nonrenewal of Mr. Cummings' contract to the District Superintendent, Dr. Maria Goodloe-Johnson (*hereinafter* "Superintendent").

By not accommodating Mr. Cummings' disability, the District did not allow him sufficient opportunity to demonstrate improvement during the probationary period as required by RCW 28A.405.100(4). Additionally, the Superintendent's determination of probable cause, that was under review by the Hearing Officer, was based on

¹ IEPs are Individualized Education Plans. Their definition and processes applicable to them are stated in WAC 392-172A-03090 through WAC 392-172A-03115.

incorrect information that the District had accommodated him for his ADHD disability when it had not. Consequently, the Superintendent's determination was without sufficient basis, as required by RCW 28A.405.210 and RCW 28A.405.300.

II. ASSIGNMENTS OF ERROR

A. The Superior Court erred in its Order dated March 2, 2012 (CP 2737-41) (**Appendix A**)² affirming the Hearing Officer's Opinion dated May 2, 2011 (**Appendix B**) as follows:

1. In finding that there was sufficient cause to nonrenew Mr. Cummings (FF 4); CP 2738.
2. In finding that the primary evaluator did not have a conflict of interest. (FF 5); CP 2739.
3. In finding that Mr. Cummings' ADHD did not limit his ability to teach Math and that CMP2 Math curriculum was mandated. (FF 6); CP 2739.
4. In finding that the formal observations were solely of Mr. Cummings' special education classes. (FF 7); CP 2739.
5. In concluding that Mr. Cummings did not make suitable improvements during the probation period. (CL 2); CP 2740.

² Appendix A (*hereinafter referenced as App. A*) contains the Superior Court's Order. Assignments of Error are noted in the underlined portion of the Findings of Fact (*hereinafter referenced as FF*) and Conclusions of Law (*hereinafter referenced as CL*).

6. In concluding that Mr. Cummings' ADHD disability did not trigger a duty to accommodate. (CL 3); CP 2740.
7. In concluding that the District complied with the statutory probation procedure of RCW 28A.405.100. (CL 4); CP 2740.
8. When the Court misapplied WAC 181-82-110 and overlooked the violation of the Collective Bargaining Agreement (*hereinafter* "CBA") in failing to conclude that CMP2 math violated the students' IEPs. (CL 5); CP 2740.
9. In concluding that the teacher could not challenge his nonrenewal when the District violated special education laws due to lack of standing. (CL6); CP 2740.
10. In concluding that in ruling on the admissibility of expert witness testimony, certain cross-examination and admission of exhibits, RCW 28A.405.310(3), (7)(a) and (b) had not been violated. (CL 7); CP 2740.
11. In concluding that sufficient cause to nonrenew Mr. Cummings had been established. (CL 8); CP 2741.
12. In concluding that Mr. Cummings' rights were not violated when part of the statutory hearing was conducted without a court reporter. (CL C); CP 2741.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err in finding that the District had sufficient cause to nonrenew Mr. Cummings when one of its evaluators did not support this determination? (Assignment of Error No. 1) **(FF No. 4)**.

2. Did the Superior Court err in finding that the District's primary evaluator's recommendation was based on her judgment as a professional educator and not affected by a conflict of interest impairing her qualifications when she was also assigned to be Mr. Cummings' math coach? (Assignment of Error No. 2) **(FF No. 5)**.

3. Did the Superior Court err in finding that Mr. Cummings' ADHD did not substantially limit his ability to teach CMP2 Math when his assignment changed mid-year and he was not given sufficient time to prepare? (Assignment of Error No. 3) **(FF No. 6)**.

4. Is the Superior Court's Finding that the District's CMP2 Math curriculum was mandated clearly erroneous when the CMP2 curriculum was not included on his students' IEPs and so not appropriately mandated for special education students? (Assignment of Error No. 3) **(FF No. 6)**.

5. Did the Superior Court err in finding that the District's formal teaching observations were solely of Mr. Cummings' Special

Education classes when the Hearing Officer clearly considered Mr. Cummings' performance teaching other classes? (Assignment of Error No. 4) **(FF No. 7).**

6. Did the Superior Court misapply RCW 28A.405.310(8) affirming the Opinion that Mr. Cummings did not make suitable improvements during the probationary period when the second evaluator disagreed? (Assignment of Error No. 5) **(CL No. 2).**

7. Did the Superior Court err in not finding a violation of RCW 49.60.180 when it retroactively determined that Mr. Cummings' ADHD did not trigger a duty to accommodate? (Assignment of Error No. 6) **(CL No. 3).**

8. Did the Superior Court in concluding that the District did not violate RCW 28A.405.100 err in affirming the Opinion when Mr. Cummings was not given a meaningful opportunity to improve and the conclusion is not supported by substantial evidence? (Assignment of Error No. 7) **(CL No. 4).**

9. Did the Superior Court misapply WAC 181-82-110 when it upheld the Opinion that requiring Mr. Cummings to teach CMP2 Math curriculum did not violate WAC 181-82-110 or the parties' CBA? (Assignment of Error No. 8) **(CL No. 5).**

10. Did the Superior Court err in limiting Mr. Cummings from challenging his nonrenewal based on the District's violations of special education laws because CMP2 math curriculum violated his students' IEPs and it was therefore inappropriate to mandate that curriculum and evaluate based on that curriculum? (Assignment of Error No. 9) **(CL No. 6).**

11. Did the Superior Court misapply RCW 28A.405.310(3), (7)(a) and (b) in concluding that the Hearing Officer acted within his discretion when he excluded testimony of an expert witness, certain cross-examination and admission of certain exhibits? (Assignment of Error No. 10) **(CL No. 7).**

12. Did the Superior Court misapply RCW 28A.405.310 when it upheld the Hearing Officer's determination that the District demonstrated sufficient cause to non-renew Mr. Cummings' employment contract? (Assignment of Error No. 11) **(CL No. 8).**

13. Did the Superior Court err in finding that there was no prejudice after finding the Hearing Officer violated RCW 28A.405.310(10) by conducting a portion of the hearing without a court reporter present? (Assignment of Error No. 12) **(CL C).**

IV. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Mr. John Cummings was nonrenewed by the Seattle Public Schools by letter dated May 10, 2010. CP 1638-9. Mr. Cummings timely appealed his nonrenewal pursuant to RCW 28A.405.300. Pursuant to RCW 28A.405.310, the hearing was held before the Hearing Officer on seven days between October 25, 2010 and April 17, 2011.

The Hearing Officer issued an Opinion pursuant to 28A.405.310 on May 2, 2011 (CP 69-133) (**App. B**) determining that the District proved by a preponderance of the evidence that it had sufficient cause to nonrenew Mr. Cummings' contract.

Mr. Cummings appealed to King County Superior Court Judge Bruce E. Heller who affirmed the Opinion while expressing some reservations. CP 2737-41 (**App. A**).

B. SUBSTANTIVE FACTS

1. MR. CUMMINGS WAS A SUCCESSFUL TEACHER UNTIL HE WAS PLACED ON PROBATION.

John Cummings received a teaching certificate in New York state in 1993. In 1998, he received a Washington state teaching certificate with endorsements in Special Education for kindergarten through twelfth grade and History in fourth through twelfth grades. CP 876. He is not endorsed in the State of Washington to teach

general education other than History to fourth through twelfth grade students. CP 522, 629-30. Specifically, he is not endorsed or certified to teach math to general education students. CP 876.

Mr. Cummings successfully taught special education language arts and social studies in the Seattle District for two years preceding the 2009-10 school year. CP 887-90. He had received satisfactory evaluations throughout his career until the fall of 2009 when he received an unsatisfactory evaluation from his evaluator and math coach, Ms. Scarlett. CP 987. Mr. Cummings has never received a complaint from a student or parent. CP 956.

2. MR. CUMMINGS' ASSIGNMENT IN 2009-10 SCHOOL YEAR AND THE PROBATIONARY PERIOD.

In June 2009, Principal Sarah Pritchett (*hereinafter* "Ms. Pritchett") informed Mr. Cummings that he would have a new assignment and would teach special education math to special education students in the 2009-10 school year. In the meeting, she did not mention CMP2 Math curriculum. CP 114. As a result, Mr. Cummings spent the summer of 2009 preparing to teach a different math curriculum to special education students. CP 917-8, 647, 924-5.

Mr. Cummings had previously taught language arts and social studies for approximately ten years. He was surprised by the

new assignment. CP 918. It was presented that teaching special education remedial math was his only option. CP 921. Mr. Cummings understood that the focus of teaching remedial math to special education students is to help students progress to grade level or close to grade level. CP 920. If he had known he would be asked to teach CMP2 Math, Mr. Cummings would have refused to accept the assignment. CP 920.

Yet, in the fall of 2009, Mr. Cummings was assigned to teach general education math despite the fact he was not endorsed to teach that subject to 6th, 7th and 8th graders. CP 1048, 630. Mr. Cummings was assigned to teach five math classes including three special education math classes and two general education math improvement classes. CP 929. His sixth grade and eight grade math improvement classes consisted of general education students. CP 1047-8.

Soon after school started, Mr. Cummings met with Ms. Pritchett and Jason Ihde, Math Department Chair, where it was agreed that there was no mandated curriculum for special education math but rather, a special education teacher should teach to the goals and objectives of the IEPs. CP 950-951.

In October 2009, Ms. Scarlett, mandated that Mr. Cummings teach CMP2 math curriculum, without changing the students' IEPs

mandating specialized instruction. CP 951. CMP2 curriculum is not well-suited to special education students and is a very difficult curriculum to teach. CP 949, 650. CMP2 Math curriculum is typically taught by a teacher who has a college degree in math. CP 629. Mr. Cummings advised Ms. Scarlett that he was unaware of any mandate for special education teachers to teach special education math using CMP2. CP 949.

On January 4, 2010, Mr. Cummings received an unsatisfactory evaluation. CP 1569-73. On January 8, 2010, he was placed on probation pursuant to RCW 28A.405.100(4) for a 60 day period and given a Plan for Improvement. CP 1557-68.

Ms. Scarlett, was assigned to be both Mr. Cummings' primary evaluator as referenced in RCW 28A.405.100(4) and his math coach. The purpose of providing a coach during the probation period is to help the teacher improve and become more effective. CP 657. Ms. Scarlett is not endorsed in special education and had not previously served as the primary evaluator of a teacher during a probation period. CP 311, 316. The District assigned Ms. Day to be Mr. Cummings' secondary evaluator as referenced in RCW 28A.405.100(4). CP 523.

Both Ms. Day and Mr. Cummings believed it was a conflict of interest for Ms. Scarlett to be a math coach and primary evaluator. CP 656-7. Mr. Cummings testified that he was not comfortable with Ms. Scarlett as his coach, stating that he felt intimidated in meetings with her and did not feel she was actively trying to help him become a better teacher. CP 957-9. He felt that she was out to get him, testifying: CP 959:

Q So in Ms. Scarlett's role as math coach, did you feel comfortable going to her to get assistance on math?

A No, I didn't. I felt anything that I said to her was going to be used against me later.

At the end of the 2009-10 school year, the eighth grade students voted Mr. Cummings as the most popular staff member. CP 956. Furthermore, the test scores of special education math students taught by Mr. Cummings improved over prior years. CP 947-8.

Principal Pritchett did not criticize Cummings' teaching during the 2009-10 school year and did not provide him any written evaluation of his performance during the probationary period. CP 1048, 1056.

Ms. Scarlett and others drafted a Probation Summary document, dated April 29, 2010, (CP 1633-1634) which was provided to the Superintendent and upon which she based her

recommendation as to whether to renew his contract. The document misinformed the Superintendent that Mr. Cummings had been granted an accommodation for his ADHD during the probation period when he had not. On April 30, 2010, Mr. Cummings received an unsatisfactory final evaluation (CP 1628-1632) and a letter on May 4, 2010, he received a letter stating that the District had probable cause to nonrenew his contract pursuant to RCW 28A.405.210 and RCW 28A.405.300. CP 1639.

3. THE DISTRICT'S SECOND EVALUATOR THOUGHT HIGHLY OF MR. CUMMINGS' TEACHING.

Ms. Day, Mr. Cummings' second evaluator assigned by the District, is highly credentialed and was extremely well-qualified to evaluate teachers. Prior to 2010, Ms. Day worked for the Seattle School District for twenty-two years including fifteen years as a middle school and high school principal and assistant principal. CP 586-90. As a Principal, Ms. Day evaluated 30-40 teachers each year and has evaluated over 360 teachers. CP 588-9.

Ms. Day described an attribute of a good teacher as one who has relationships with students that lead to good classroom control. In evaluating a teacher, Ms. Day also looks for, among other things, the physical look of the classroom, whether a teacher is able to

design and deliver a lesson, the teacher's questioning strategies, management of off-task behavior and the flow of the lesson. CP 590-1. Ms. Day described the main indicators of a teacher having problems are parent complaints and/or classroom management problems, CP 591-2. Ms. Day was aware that there had never been any parent complaints regarding Mr. Cummings' teaching. CP 691.

Ms. Scarlett, erroneously told Ms. Day that Mr. Cummings was "highly qualified" in Mathematics. CP 604.³ Not until near the end of the probation period did Ms. Day independently discover that Mr. Cummings was not, only learning this by viewing his HOUSSE highly qualified form, a form used by the District to score a teacher's math qualifications. CP 604. She determined that the form had neither been completed nor signed by Mr. Cummings. CP604. Mr. Cummings was not aware of the form until the Spring of 2010 when Ms. Day suggested that he check his file. CP 701-2. The District had completed the form without showing it to Mr. Cummings. CP1046. Ms. Day eventually learned that Mr. Cummings was neither "highly qualified" nor endorsed to teach general math to regular sixth to eighth grade students. CP 702. Mr. Cummings has only six hours of

³ "Highly qualified" pursuant to WAC 392-172A-01085 requires an endorsement in Math or scoring high enough on the State's HOUSSE-form to be certified as "highly qualified."

credit in college math including three in basic math instruction. CP 904.

Ms. Day knew that that a teacher cannot legally be placed on probation regarding their teaching of a subject in which he is not endorsed. CP 830-1. Because Ms. Day did not know that Mr. Cummings was not endorsed in math until very near the end of the probation period, she evaluated Mr. Cummings assuming that he was properly endorsed to teach mathematics. CP 604-5.⁴

Teaching special education math is generally basic, but varies depending on the students' academic level and typically includes addition, subtraction, multiplication, division and possibly fractions. CP 608. Mr. Cummings described to Ms. Day the specific disabilities of six of his special education students. She also reviewed the IEPs, including the math level, of these six students. CP 648. Two eighth graders assigned to Mr. Cummings' class tested at the first grade level; thus, appropriate instruction for this student is very basic math. CP 710, 648. Ms. Day explained that a student testing at the first grade level would not understand CMP2 Math. CP 648.

⁴ Ms. Day testified that in her experience, the District neither assigned nor interviewed a teacher for a position who was not properly endorsed. CP 606.

In Ms. Day's experience CMP2 Math is a very difficult curriculum to teach and is typically taught by a teacher who has a college degree in math and a few had Ph.D.s in Math. CP 629, 650-51, 949. Ms. Day stated that when she was Principal, CMP2 Math was not mandated by the District to be taught to Special Education middle school students. CP 680-1.

Ms. Day opined that it was a conflict of interest for Ms. Scarlett to simultaneously be both Mr. Cummings' primary evaluator and his Math Coach. CP 656. Ms. Day raised the issue with Ms. Scarlett and Ms. Morris, the District's Human Resources Director. Mr. Cummings expressed similar concerns. CP 656-7.

Ms. Day, in her final Probation Summary, did not recommend termination of Mr. Cummings. CP 2222-7. Rather, she recommended to the District that Mr. Cummings' contract be renewed for the 2010-11 school year and testified that Mr. Cummings "... is a gifted special education teacher." CP 701, 714.

In her Final Recommendation, Ms. Day writes:

It has been extremely difficult to assess this teacher because of his lack of proficiency in mathematics was apparent from the beginning. He has and is continuing to struggle with this curricula. ...

I do not recommend termination of this teacher. I have seen enough change and growth over the past few weeks to believe

that Mr. Cummings is really trying and **has the ability to improve...**

If I had a child or grandchild who qualified for Special Education, I would very much like for him or her to have contact or a class with Mr. Cummings. He is excellent at being a safe place/ touchstone for these children and for providing the emotional and social support needed.

I am puzzled, given his questionable and patently thin qualifications, why this teacher was expected to teach three different levels of modified CMP math. In addition, he was given the two remedial classes. If they are expected to master CMP concepts, the special education students deserve an academically qualified teacher to deliver this curricula.

If possible, Mr. Cummings needs another probationary year to see if he can apply what he learned this year to providing quality instruction in every class, every period. Ideally, he would have a reasonable amount of preparations in his academic areas – Special Ed and History. He absolutely should not be given math classes above the basic skills ordinarily taught in direct instruction, self-contained classrooms. CP 2226. (*Emphasis added*).

Marilyn Day testified at CP 713-15 (*emphasis added*):

There are no parent complaints of any kind, none were brought to my attention, even about the math instruction. The classroom was clean and organized and orderly, purpose statements, Mr. Cummings seemed more prepared and composed, so things had in -- in five hours of instruction that I observed, the change from the first one to the fifth was enormous. I saw growth.

...

The point that I was making there is that this man, in my professional opinion, is a gifted special education teacher. I saw him able to handle very challenging, difficult students and calming them, redirecting them, praising them, validating them. ... I saw this man as a competent special education teacher. Not competent CMP math teacher, but a competent special education teacher. And that's why I said that did I not support the non-renewal.

Ms. Day noted that her ability to evaluate teachers improved with experience. She was critical of the District for assigning an inexperienced Assistant Principal to evaluate Mr. Cummings during his probation period. CP 718-9.

Ms. Day was not allowed to express any opinion at the meeting with District officials concerning the nonrenewal of Mr. Cummings's contract. Ms. Day explained that she was cut off and that the matter was not discussed with her and that as of the time of the Hearing, no District Administrator had engaged with her regarding her recommendation. CP 733-4.

Ms. Day testified that she believed that Mr. Cummings' contract should have been renewed for the 2010-11 school year (CP 777), in part because of his excellent rapport with students and also because she recognized him as a gifted special education teacher. CP 669.

Ms. Morris, District Human Resources Director, testified in her twenty years of working in Human Resources for the District that she has never had any other case where a teacher was non-renewed even though one of the District's evaluators recommended contract renewal. CP 533-5.

4. MR. CUMMINGS REQUESTED ACCOMMODATION AND THE DISTRICT DID NOT ACCOMMODATE.

On January 30, 2010, Mr. Cummings notified the Superintendent that he had Attention Deficit Hyperactivity Disorder (*hereinafter* “ADHD”) and requested accommodation CP 1666-1669. On March 1, 2010, Dr. Arden Snyder, Mr. Cummings’ psychologist, requested that the District accommodate Mr. Cummings’ ADHD. CP 1670-1, 417-8. The District failed to respond to Dr. Snyder. CP 1366.

Dr. Snyder testified that Mr. Cummings suffered from ADHD “combined inattentive and hyperactive” in November 2009. CP 396, 417. He described Mr. Cummings’ symptoms as having difficulty sustaining attention and concentration, having difficulty with organizing and getting motivated for the work, maintaining energy and effort on tasks, and having difficulty and ability accessing information and utilizing it well. CP 397, 965-6.

Mr. Cummings explained that his ADHD affected his ability to adjust the curriculum at the last minute and to teach new curriculum on short notice. As a result, he had particular problems with the demands to change his curriculum to include the CMP2 math curriculum in October 2009, midway through the school year.

CP 964, 966-7. ADHD also made it difficult for Mr. Cummings' to teach a large number of classes each requiring a different preparation. CP 403.

Dr. Snyder testified that in his professional opinion, Mr. Cummings' teaching ability would have been enhanced had the District provided accommodation. CP 405. Dr. Snyder testified that the District could have accommodated Mr. Cummings in any of a myriad of specific ways. Specific accommodations could have included: time and a half for preparation time giving Mr. Cummings added time to prepare his lessons; providing Mr. Cummings assistance in breaking down larger projects into smaller steps; developing or adapting an existing checklist to structure tasks that have multiple steps; assistance in establishing short term deadlines; assistance setting priorities; and, providing assistance in organizing his grade book, planner and projects. CP 402-403.

Ms. Scarlett was aware that Mr. Cummings suffered from ADHD since he advised her of it. Principal Pritchett commented on it. CP 987. Yet, Mr. Cummings was never offered any accommodation by Ms. Scarlett at any time during the 2009-10 school year. CP 988. The District stated that they assigned a consulting teacher to work with him but later acknowledged that this

was not an accommodation but rather was offered to every teacher on probation. Opinion, at 58-59, CP 126-127.

Mr. Cummings received a letter from the District, (CP 1649-50) indicating that he was being denied accommodations. CP 1195-6, 1198-9. Mr. Cummings testified it would have been helpful had he received help with organization or extra planning time. CP 1327. Had he been provided accommodations during the probationary period, Mr. Cummings would not have been as run down, he would have been less anxious and his teaching performance would have been enhanced. CP 1199, 1200.

The Probation Summary provided to the Superintendent and upon which her decision to nonrenew was based, erroneously listed accommodations given to Mr. Cummings. CP 1633-4, 1194. Yet, Mr. Cummings was never granted *any* of the five accommodations listed therein nor was he provided any help in organizational skills. CP 1194-6.

When Mr. Cummings met with the Superintendent on May 6, 2010, he learned that the Superintendent believed he had been granted accommodations when he had not. CP 1203. The District never engaged in an interactive process with him regarding providing accommodations. CP 1204-5.

Ms. Scarlett testified that the District's Accommodation Coordinator had rejected Mr. Cummings's requests and that no accommodations were provided. CP 314-6, 465.

5. THE DISTRICT'S DECISION TO NONRENEW WAS NOT BASED ON THE RECOMMENDATIONS OF BOTH ITS EVALUATORS.

The District's decision to nonrenew was based on the evaluation of its primary evaluator, Ms. Scarlett. The Superintendent could not recall the recommendation of the second evaluator, Ms. Day. Nor did the Superintendent know the name of Mr. Cummings' second evaluator, her credentials, how many times she observed Mr. Cummings or what she ultimately concluded about Mr. Cummings' teaching.⁵

Principal Pritchett gave her opinion but did not write any written evaluation of Mr. Cummings during the probation period. She did prepare Mr. Cummings' satisfactory teaching evaluations during the 2007-08 and 2008-09 school years. CP 2153-60.

The recommendation of Ms. Medsker, the Director of Education was based on lack of information. She confirmed when she made the recommendation, she did not know whether Mr. Cummings had a Washington state math endorsement nor had she

⁵ CP 369, 370, 379, 380.

reviewed Mr. Cummings' personnel file. CP 441. Ms. Morris who also recommended nonrenewal had no personal knowledge of Mr. Cummings' teaching performance. CP 521.

The Superintendent did not know why Mr. Cummings was assigned to teach math or whether he was endorsed to teach math. CP 381-3. Yet, she stated that she only wanted endorsed math teachers to teach middle school math. CP 382.

The Superintendent considered the recommendations of others who had no background in teacher education. CP 521. She could not recall any other non-renewal where the second evaluator recommended against the non-renewal of the teacher or where the teacher was non-renewed after teaching courses they were not endorsed to teach. CP 385-7. The Superintendent's decision to nonrenew Mr. Cummings was not based on personal knowledge; nor was it based on accurate information. CP 360, 368-9.

V. ARGUMENT

A. STANDARD OF REVIEW

RCW 28A.405.340 provides in pertinent part that a court may remand or reverse the Hearing Officer's decision if the Appellant's rights may have been prejudiced because the decision was (**App. C**):

- (1) In violation of constitutional provisions; or

- (2) In excess of the statutory authority or jurisdiction of the board or hearing officer; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislative authorizing the decision or order; or
- (6) Arbitrary and capricious.

These standards apply in this Court. This Court must review the Superior Court's and the Hearing Officer's Findings of Fact under the clearly erroneous standard. *Clarke v. Shoreline School Dist. No. 412*, 106 Wn.2d 102, 720 P.2d 793 (1986). Issues of law are reviewed de novo. *Id.* The issue of whether the District had sufficient cause to nonrenew Mr. Cummings' contract pursuant to Chapter 28A.405 is one of mixed law and fact and is subject to de novo review. *Clarke, supra*, at 111.⁶

The question of whether specific conduct, practices or methods constitute sufficient cause for discharge is one of mixed law and fact, i.e., there is a question as to the propriety of the inferences drawn by the Hearing Officer from the raw facts, and as to the meaning of statutory term. A court reviews such issues de novo, meaning the reviewing court determines the correct law and applies it to the facts as found by the Hearing Officer.

Id. at 110, quoting *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wash.2d 317, 330, 646 P.2d 113 (1982).

⁶ *Sargent v. Selah Sch. Dist.*, 119, 23 Wash.App. 916, 919, 599 P.2d 25, (1979); rev. denied, 92 Wash.2d 1038 (1979)

This Court has the latitude to re-examine the propriety of the inferences drawn from the facts by the trial court and the Hearing Officer. In doing so, this court should determine that the District did not meet its burden of proof to show sufficient cause to nonrenew Mr. Cummings.

**B. OVERVIEW OF LAW APPLICABLE TO
NONRENEWAL OF TEACHERS' CONTRACTS.**

A school district may terminate the contract of a teacher in two manners. A teacher can be discharged for nonremediable conduct where the conduct is so egregious that the District does not have to give the teacher a chance to improve. *Clarke, supra* at 113.⁷ That is not the type of case before this court.

The second type of termination is a nonrenewal, which is the type of termination faced by Mr. Cummings. A teacher who has remediable teaching deficiencies can be nonrenewed only after being placed on probation and given a meaningful opportunity to improve. RCW 28A.405.100 and 28A.405.210. *Wojt v. Chimacum Sch. Dist.* 49, 9 Wash.App. 857, 861–62, 516 P.2d 1099 (1973) (inability to

⁷ See *Pryse v. Yakima School Dist.* 7, 30 Wash.App. 16, 24, 632 P.2d 60 (1981) teacher discharge upheld where the conduct at issue lacked “any positive educational aspect or legitimate professional purpose”); *Mott v. Endicott Sch. Dist.* 308, 105 Wash.2d 199, 203, 713 P.2d 98 (1986) (“in some instances, teacher misconduct can be so egregious that the sufficient cause determination can be made as a matter of law”).

maintain discipline and deficient teaching methods constitute remediable teaching deficiencies; meaningful opportunity to improve required).⁸

Mr. Cummings' contract was nonrenewed following a probationary period, which failed to meet the legal requirements set forth in RCW 28A.405.100, RCW 28A.405.210 and the CBA. CP 1393-1541. The District did not fulfill these legal requirements and despite the Hearing Officer's and Superior Court's determination to the contrary, the District cannot meet its burden to demonstrate that it had sufficient cause to nonrenew the teaching contract of Mr. Cummings.

C. THE HEARING OFFICER'S IMPROPER EVIDENTIARY RULINGS CONSTITUTE ABUSE OF DISCRETION.
(Assignments of Error Nos. 10 and 12) (CL 7 and C)

1. IT WAS ABUSE OF DISCRETION TO EXCLUDE TESTIMONY OF AN EXPERT WITNESS. (Assignment of Error No. 10) (CL 7).

[I]t is the proper function of the trial court to exercise its discretion in the control of litigation before it. Exercise of that discretion will not be interfered with by an appellate court unless there has been an abuse of discretion which caused prejudice to a party or person.

⁸ *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 113–114 (1986) was both a discharge and a nonrenewal but provides a good overview of the law as it concerns termination of teachers with continuing contracts of employment.

Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 777, 819 P.2d 370 (1991). (*internal citations omitted*).

RCW 28A.405.310(3) provides, in pertinent part (**App. C**):

At the hearing, ..., the employee may produce such witnesses as he or she may desire.

Yet, the Hearing Officer improperly excluded the testimony of expert witness Patricia Steinburg based on the District's argument that the expert testimony was irrelevant since she had not testified to the Superintendent prior to the non-renewal decision. CP 825-71. This ruling turns the basis for expert testimony on its head, constitutes an abuse of discretion and violates RCW 28A.405.310(3). In concluding that there was no abuse of discretion, the Superior court erred.

Ms. Steinburg met the qualifications for an expert witness and previously has testified as an expert witness. She has vast experience in special education in the public schools, in the legal requirements and on the practical realities of special education. CP 810-814.

Here, Ms. Steinburg's testimony would have provided a more complete explanation of the nature of special education students and the basic legal underpinnings of special education as provided in WAC 392-172A-03090 through WAC 392-172A-03110. Her testimony would have shown that it is inconsistent with special

education policies to mandate any curriculum to special education students and that CMP2 curriculum is an inappropriate curriculum for these students. CP 834-44. Her testimony would have shown that Mr. Cummings was held to an unfair, irrelevant and arbitrary standard.

In her offer of proof, Ms. Steinburg testified that the purpose of an IEP is to design an individualized plan so that each student receives instruction at their own individual level. Each IEP must be signed by several staff members and a parent, specify goals in the areas of math, reading and writing and provide stated timelines and strategies for achieving the goals. CP 609. Her testimony would have shown that changing the curriculum in the manner that it was changed required a meeting of the IEP team for each student. CP 854-5.

Ms. Steinburg' testimony would have aided the Hearing Officer and this court to understand that Ms. Scarlett's final evaluation lacked credibility. CP 1627-32. Ms. Scarlett had not reviewed the IEPs of Mr. Cummings' students. CP 1070. There is no evidence that CMP2 Math was included in any of the IEPs. Yet, incredulously, in its final evaluation, the District determined, without basis, that Mr. Cummings was "unsatisfactory" in his knowledge of

subject matter because he did not teach the IEP- identified goals. CP 1628-32.

Ms. Steinburg's testimony would have shown that Ms. Scarlett's evaluation process was flawed and did not support sufficient cause for non-renewal. Her testimony was consistent with ER 702 and it was an abuse of discretion to exclude it.

2. TO LIMIT CROSS-EXAMINATION OF THE PRINCIPAL WAS AN ABUSE OF DISCRETION.
(Assignment of Error No. 10) (CL 7)

The Hearing Officer excluded testimony concerning Mr. Cummings' employment with the District prior to 2009; yet, at the closing argument, he stated he wish he had heard more regarding Mr. Cummings' teaching in prior years. Superior Court Ex. FE 16, April 14, 2011 Transcript, p. 47, l. 8-25; p. 48, l. 1-11. The Hearing Officer denied cross-examination of Ms. Pritchett regarding her satisfactory evaluations of his teaching from the 2007-08 and 2008-09 school years. CP 473-5. The Hearing Officer also excluded from admission letters of recommendation regarding Mr. Cummings that the Superintendent had reviewed when making her decision to nonrenew. (Opinion at 47, CP 115, 905-7) These rulings prejudiced the proceedings and prevented the consideration of critical evidence.

Since the Hearing Officer did not have full knowledge of the materials reviewed by the Superintendent when he decided that the District had sufficient cause for nonrenewal, the record is incomplete and there is not substantial evidence to support the conclusions reached. The Superior Court erred in finding no abuse of discretion. (CL 7).

3. ALLOWING THE HEARING TO CONTINUE WITHOUT A COURT REPORTER CONSTITUTES AN ABUSE OF DISCRETION. (Assignment of Error No. 12) (CL § C)

Pursuant to RCW 28A.405.310(10) (**App. D**):

A complete record shall be made of the hearing and all orders and rulings of the Hearing Officer and School Board.

A court reporter was not present for 45 minutes of the closing argument and thus, part of the hearing was not transcribed over the objection on Mr. Cummings' counsel. Since the Hearing Officer ruled that the opening and closing oral arguments are part of the hearing record, a complete record was not made in violation of RCW 28A.405.310(10) and is not available for appellate review. CP 2655.

The Superior Court found that the Hearing Officer violated RCW 28A.405.310(10) but did not find the error to be prejudicial. But, Appellant was prejudiced without the ability to review the District's closing argument which contained inaccurate arguments

that are not supported by the record. And, the Hearing Officer's questions to Mr. Cummings's counsel demonstrating his erroneous burden-shifting remain off the record and impossible to challenge.

That the Hearing Officer allowed the closing arguments without a court reporter present should result in this Court's reversal of the Hearing Officer's Decision. That determination by the Superior Court is clearly erroneous and should be reversed.

D. THE DISTRICT'S PROBATION PROCESS DID NOT COMPLY WITH RCW 28A.405.100 BECAUSE MR. CUMMINGS WAS NOT PROVIDED A MEANINGFUL OPPORTUNITY TO IMPROVE. (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11) (FF 4, 5, 6 and 7; CL 2, 3, 4, 5, 6, 7 and 8)

RCW 28A. 405.100(4) provides statutory protections for teachers in the nonrenewal process. (See **App. E**). The purpose of the probationary period is to give the probationer the opportunity to demonstrate improvement. RCW 28A.405.100(4). To meet this requirement, a meaningful opportunity to improve must be provided. *Wojt*, 9 Wn.App. at 861-2. Mr. Cummings was not given a meaningful opportunity to improve because his primary evaluator was biased, inexperienced and had a conflict of interest that prevented her from being the impartial evaluator required by the statute.

He was also not given a meaningful opportunity to improve because the District discriminated against Mr. Cummings when it failed to accommodate his ADHD disability and gave him a new assignment immediately preceding the probation period despite his notification to the District that he needed accommodation to help him be a better teacher.

Mr. Cummings' assignment and thus, his subsequent evaluations were based on curriculum that he was unfairly directed to teach mid-year and was inappropriate for his special education students. The Hearing Officer also considered evaluations in areas Mr. Cummings was assigned to teach but was not properly endorsed to teach in violation of WAC 181-82-110.

1. THE PRIMARY EVALUATOR WAS BIASED AND HAD A CONFLICT OF INTEREST. (Assignments of Error Nos. 2 and 7) (FF 5; CL 4)

The Superior Court erroneously determined that Ms. Scarlett had no apparent or actual conflict when acting both as math coach and primary evaluator to Mr. Cummings.⁹ The Superior Court also erred by determining that this matter was simply an issue of fact when the issue of conflict of interest is a question of law or a mixed

⁹ The Hearing Officer erred in finding that there was no conflict of interest. Opinion at 52-3, CP 120-122.

question of fact and law. This Court should review this issue de novo and determine that a conflict of interest existed that fundamentally affected the integrity of the probationary process.

The District's reliance on Ms. Scarlett as the primary evaluator undermines their case. The due process inherent in both RCW 28A.405.100 and 28A.405.310 were violated by this conflict of interest. Even if this court finds that there was no actual conflict of interest, the integrity of the process was undermined and compromised. The weight given to Ms. Scarlett's opinion should be accordingly discounted. The flaw is irreparable and should require this court to find that the District cannot meet its burden to prove sufficient cause for nonrenewal.

Ms. Day, an expert in teacher evaluation, opined that Ms. Scarlett's role as primary evaluator was compromised and that it was a conflict of interest for Ms. Scarlett to simultaneously be both Mr. Cummings' primary evaluator and his Math Coach. Ms. Day raised this issue with both Ms. Scarlett and Ms. Morris, the District's Human Resources Director. Mr. Cummings expressed similar concerns which the District ignored. CP 656-657.

Ms. Day testified, at CP 657:

What I saw happening was that Mr. Cummings would meet with Ms. Scarlett in the role of her being the math coach, and they would talk about lessons, and then it would drop into evaluative, and there wasn't a clear line. If he's supposed to be, through the performance improvement plan, receiving assistance and help from a math coach, that should be clean, in my opinion and not tainted by the evaluation process.

Mr. Cummings complained about the objectivity of the evaluator in January 2010, at the beginning of the probationary period. CP 1666-9. He described specific instances where language he used with Ms. Scarlett in her role as Math Coach was used against him in her subsequent evaluations. CP 957-8. Mr. Cummings was afraid to discuss his teaching weaknesses with Ms. Scarlett in her role as Math Coach because she then cited those weaknesses when evaluating his performance. CP 959.

Ms. Scarlett's bias is also evident by the fact that she mandated the new CMP2 math curriculum without complying with special education regulations and without understanding the IEPs of Mr. Cummings' students. Ms. Scarlett did not understand the appropriate methods for teaching special education students. Ms. Scarlett did not have the skills and background to evaluate a special education teacher.¹⁰ Ms. Scarlett was not certified to teach special

¹⁰ Had Ms. Steinburg's expert testimony been allowed, her testimony would have shown that Ms. Scarlett's evaluations were inadequate. See p. 26 *infra*.

education and had never before evaluated a teacher during the probationary process. CP 311, 316.

Ms. Scarlett never reviewed the IEPs of Mr. Cummings' students or discussed their specific disabilities with him. CP 1069-70. She had no expertise in special education, CP 310, and her evaluations suffered as a result.

The record is clear that Ms. Scarlett's bias and the underlying conflict of interest interfered with providing Mr. Cummings with a meaningful opportunity to improve. CP 1424-5. The protections of RCW 28A.405.100(4) were not provided.

2. FAILURE TO ACCOMMODATE MR. CUMMINGS' ADHD HINDERED HIS ABILITY TO IMPROVE.
(Assignments of Error No. 3 and 6) (FF 6, CL 3)

The Hearing Officer and the Superior Court agree that Mr. Cummings has a disability, ADHD. Opinion at 59, CP 127, (**FF No. 6**) CP 2739. Yet, both erroneously found that Mr. Cummings' ADHD did not limit his ability to teach math or to deliver the CMP2 curriculum. Opinion at 60, CP128, (**FF No. 6**). As a result, the Superior Court and Hearing Officer both erroneously concluded that Mr. Cummings' ADHD did not trigger a duty to accommodate under RCW 49.60.180 or the Americans With Disabilities Act of 1990, 42 U.S.C. §12101 et seq. and as amended by the ADA Amendment Act

of 2008. (Opinion at 54-63, CP 122-31; **CL No. 3**). By failing to accommodate, the District essentially handicapped Mr. Cummings and failed to give him a meaningful opportunity to improve.

The flaw in the Opinion and the Superior Court's Order is that both view the facts at the time of the hearing, after the work was performed, and determine, almost speculatively, that providing the requested accommodations would not have resulted in Mr. Cummings being able to teach CMP2 math curriculum to special education students.

Yet, the proper inquiry for this Court to make is whether the District violated RCW 49.60.180 when it failed to take Mr. Cummings' ADHD seriously by making significant changes to the curriculum he was assigned to teach mid-year, by continuing with probation without engaging in an interactive process regarding requested accommodations and by refusing his request for additional planning time and for clerical support. The District's duty arises at the time it receives notice. *Dean v. Metro*, 104 Wn.2d 627, 632-639, 708 P.2d 383 (1985). It constitutes an error of law to look retroactively at the situation and thereby determine that the accommodations were not necessary or would not have made a difference.

According to *Clarke, supra* at 117:

... school authorities should refrain from discharging a teacher as a matter of law, except in the most egregious cases, ..., especially where the teaching deficiency is related to a handicapping condition amenable to rehabilitation.

Here, the District not only failed to accommodate Mr. Cummings' ADHD but failed to engage in the interactive process to determine what, if any, accommodations might have assisted him to teach difficult curriculum sprung on him mid-year that was above the ability of most, if not all, of his special education students. In failing to engage in the interactive process, the District clearly violated RCW 49.60.040(7). The Superior Court's affirming that the Hearing Officer's conclusions that Mr. Cummings did not have a disabling condition that triggered the accommodation process is an error of law.

The Seattle School District had the law explained to them in a previous case:

Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process. RCW 49.60.040(7)(d). A reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions. ... **The employer has a duty to determine the nature and extent of the disability, but only after the employee has initiated the process by notice.** In

addition, the employee retains a duty to cooperate with the employer's efforts by explaining the disability and the employee's qualifications. A good faith exchange of information between parties is required whether the employer chooses to transfer the employee to a new position or to accommodate the employee in the current position.

Frisino v. Seattle Sch. Dist. No. 1, 160 Wash. App. 765, 779-80, 249 P.3d 1044, 1050 rev. denied, 172 Wash. 2d 1013, 259 P.3d 1109 (2011) (*Internal citations omitted; Emphasis added*).

The District completely failed in this regard. It is undisputed that Mr. Cummings gave the District notice of his ADHD and that no interactive process ensued. The testimony of Psychologist, Dr. Arden Snyder, clearly testified that certain accommodations would have enhanced Mr. Cummings teaching. CP 401-402. Dr. Snyder testified that he requested that the District accommodate Mr. Cummings' disability by providing him extra preparation time; specifically, time and a half for preparation. CP 402-403. The District did not provide this accommodation and as a result, Mr. Cummings' ability to teach was severely compromised.

Mr. Cummings' request for clerical support as an accommodation was also inappropriately denied. The Hearing Officer erroneously found that Mr. Cummings would not have had time to successfully use a clerk (Opinion at 56-63, CP 124-131). The Hearing Officer usurped the role of a medical provider in trying to

decide what accommodation would or would not have worked for Mr. Cummings. In doing so, he made clear errors of law.

E. THE DISTRICT DID NOT MEET ITS BURDEN OF PROOF TO SHOW SUFFICIENT CAUSE FOR NONRENEWAL SINCE MR. CUMMINGS DEMONSTRATED SUFFICIENT IMPROVEMENT.

(Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9 and 11) (FF 4, 5, 6 and 7; CL 2, 4, 5, 6 and 8)

1. THE SUPERINTENDENT'S DECISION WAS NOT BASED ON COMPLETE INFORMATION.

(Assignments of Error Nos. 1, 2, 5, 7, and 11) (FF 4 and 5; CL 2, 4 and 8)

The Superior Court's ruling that Appellant did not make suitable improvements in his math teaching deficiencies during the statutory probationary period constitutes an error of law. Similarly, the Hearing Officer erred by not giving sufficient weight to Ms. Day's testimony.¹¹

Ms. Day stated that Mr. Cummings is a gifted teacher and that he improved:

I believed at that point that according to the plan that he had been given, the Performance Improvement Plan, that in all areas, I saw improvement on Mr. Cummings' part. He was attempting to the best of his ability to deliver this curriculum. He had good classroom management skills, coming down to cleaning up the classroom and making it look as good as it possibly could. He was attempting to get help from other teachers. I saw him discussing IEPs with other teachers, so I saw improvement in this teacher, and that to me is what the

¹¹ Opinion at 43, CP 111.

probation period is about, looking for improvement. CP 671-2.

There is also unrefuted testimony demonstrating Mr. Cummings' math students improved in their test scores. CP 947-48.

In her final recommendation, Ms. Day commented, in part:

I do not recommend termination of this teacher. I have seen enough change and growth over the past few weeks to believe that Mr. Cummings is really trying and has the ability to improve, CP 2226. (*Emphasis added*).

Ms. Day also testified that Mr. Cummings “... **in my professional opinion, is a gifted special education teacher.**” CP 714-5 (*emphasis added*).

Given Ms. Day's opinion and her evaluation of Mr. Cummings during the probation period, this court must conclude the Hearing Officer erred as a matter of law in determining that Mr. Cummings lacked necessary improvement.

Furthermore, the District did not have sufficient cause since the Superintendent in making her nonrenewal decision did not consider the testimony of the second evaluator it assigned. In her testimony, the Superintendent did not even recall what the conclusion of the second evaluator was regarding whether or not Mr. Cummings should be renewed. CP 369-70, 379-80. Had Ms. Day's testimony been given the weight to which it was entitled, the District

would not be able to meet its burden of showing sufficient cause for nonrenewal. The Superior Court and the Hearing Officer erred in this regard.

In addition, the Superintendent's decision to nonrenew was based on information given to her that Mr. Cummings had been accommodated when in fact he had not. CP 1634.

Mr. Cummings' improvements together with Ms. Day's recommendation, the biases of the primary evaluator, the failure to accommodate and the lack of good faith effort by the District to assist Mr. Cummings, make it so that the conclusion that there was sufficient cause is erroneous.

2. EVALUATION AND NONRENEWAL BASED TEACHING OF GENERAL EDUCATION MATH VIOLATES WAC 181-82-110. (Assignments of Error Nos. 3, 4, 7, 8 and 11) (FF 6 and 7; CL 4, 5 and 8)

Mr. Cummings is not endorsed to teach general education math. Yet, Mr. Cummings was assigned to teach two general education classes in the 2009-10 school year.

The District's letter indicating probable cause for non-renewal did not exclude any of his classes from consideration. CP 1640-41. The Superintendent testified she had no idea if Mr. Cummings was endorsed to teach math, but acknowledged that she

would only want endorsed math teachers teaching middle school students. CP 382. Therefore, the District's letter of probable cause must be read to include consideration of the two general education classes taught by Mr. Cummings. The consideration of the District's testimony and evaluations pertaining to the general education classes violates WAC 181-82-110(1)(b) and constitutes grounds for reversal.

The Hearing Officer erred by disregarding the violation of WAC 181-82-110 (See **App. F**) when consideration was given to Mr. Cummings teaching of math to general education students. (Opinion at 32, 50, CP 100, 118) (**CL 8**).¹² The evaluations that were both the basis of the District's decision to nonrenew Mr. Cummings and the Hearing Officer's decision inappropriately included consideration of Mr. Cummings' general education classes. Mr. Cummings was also not given extra assistance to help with the out-of-endorsement assignment and the out-of-endorsement assignment was not approved by the School Board. Both circumstances also violate WAC 181-82-110. (**App. F**)

The Superior Court erred by confusing the concept of the protections of WAC 181-82-110 with the alleged ability of the District to require Mr. Cummings to teach what the District alleged

¹² The math improvement class referenced is a general education class. Opinion at 32, CP 100.

was a mandated Math curriculum of CMP2. It was illegal to place Mr. Cummings on probation or non-renew his contract based on his teaching in a class he is not endorsed to teach. The Hearing Officer attempts to bypass this problem with the District's case by finding that Mr. Cummings was nonrenewed only for his teaching of CMP2 in his special education classes. Opinion, at 50, CP 118. Yet, that finding is clearly erroneous and not supported by the evidence.

If the District had provided Mr. Cummings a meaningful opportunity to improve, it would have not evaluated him on the CMP2 curriculum that was newly assigned and it would have limited its evaluation to the teaching of remedial special education math to his special education students. Furthermore, it was reversible error to nonrenew Mr. Cummings based on his teaching of math to general education students which Mr. Cummings is not endorsed to do.

3. ASSIGNMENT TO TEACH CMP2 MATH TO SPECIAL EDUCATION STUDENTS WAS NOT APPROPRIATE.
(Assignments of Error Nos. 3, 8 and 9) (FF 6, CL 5 and 6)

The Hearing Officer erred by determining that the assignment to teach CMP2 math to special education students was appropriate. (Opinion, at 48-50, at CP 117-18).

Teaching CMP2 math was not properly within Mr. Cummings' job as a special education teacher. In September 2009,

Mr. Cummings was told there was no specific curriculum but that he was to teach to the students' skills and abilities. CP 1056. **FF No. 6** is erroneous as there was no mandated CMP2 math curriculum for special education students. Mandating this curriculum is inconsistent with WAC 392-172A-01175.

Mandating Mr. Cummings to teach CMP2 curriculum to his special education students also violates their rights under the IDEA.¹³ Contrary to the **CL No. 6**, Mr. Cummings has never claimed an individual right of action under the IDEA. Rather, Mr. Cummings claimed that mandating that curriculum violated the students' rights and was inconsistent with their IEPs. The Superior Court and Hearing Officer erred by not concluding so.

Each special education student must have an Individualized Education Plan ('IEP'). Each IEP must be signed off on by a team, specifying goals for the student in the areas including math, reading and writing and providing timelines and strategies for achieving the goals. CP 609. See generally WAC 392-172A-03090 through WAC 392-172A-03110. When CMP2 math was added to the curriculum

¹³ Individuals With Disabilities Education Act of 2004, 20 U.S.C. § 1400 *et seq.* and implementing regulations, 34 CFR §300.320-324.

of his special education students, no changes were made to the students' IEPs. CP 1094.

This assignment violates the parties' CBA, Article III, E (5):

No single instructional philosophy or technique is prescribed by the SPS for the instruction of a Special Education student. CP 1429.

The Hearing Officer erred in justifying his finding that there was no violation of the CBA, Article III, Sec. E(5) by mistakenly equating "course of study" as referenced in WAC 180-44-010 with "curriculum." (Opinion at 63-64, CP 131-132). Prescribed course of study in WAC 180-44-010 refers to topics such as math or social studies. While the Hearing Officer agreed that a special education teacher must teach within the students' IEPs (Opinion at 63, CP 131), he disregarded that principle when he mistakenly relied upon WAC 180-44-010 for a proposition that is far afield from its meaning.

F. OTHER ERRORS UNDERMINE THE SUPERIOR COURT'S DECISION THAT THE DISTRICT MET ITS BURDEN OF PROOF. (Assignments of Error Nos. 5, 7 and 11) (CL 2, 4 and 8)

It was error for the Hearing Officer to consider the recommendation of Ms. Pritchett to the extent that it purported to represent her observations of Mr. Cummings' teaching. Ms. Pritchett offered her observation of Mr. Cummings' teaching performance but

she did not document her observation, advise Mr. Cummings of any alleged deficiency or prepare any written evaluation. CP 458, 505-6. Crediting her testimony as evaluative violates RCW 28A.405.100(3)(a) and 28A.405.100(4).

The Hearing Officer also erroneously considered the “Professional Responsibility” section of Mr. Cummings’ evaluation when he was not placed on probation for “Professional Responsibility” and it was not referenced in his Performance Improvement Plan, CP 1557-68. Opinion at 32, CP 100.

The Superior Court also erred in upholding the Hearing Officer who committed the following errors:

1. Ms. Scarlett’s unsatisfactory final evaluation is unsupported by the evidence. Opinion, at 32-33, CP 100-1. The Hearing Officer erred by relying on her unsupported evaluation. The testimony is unrefuted that Mr. Cummings’ special education students improved and made adequate yearly progress in math. CP 947-8.
2. The Hearing Officer erred by not finding that the District held Mr. Cummings to inappropriate standards. Ms. Scarlett, the primary evaluator, not only did not understand his special education students and the purpose of the IEPs, she mandated curriculum that was inconsistent with the IEPs without following the administrative

process. She then held Mr. Cummings to inappropriate standards. Her lack of both certification in special education and experience in probation evaluations was unfairly prejudicial to Mr. Cummings. CP 311, 316.

G. MR. CUMMINGS SHOULD BE AWARDED ATTORNEYS' FEES AND COSTS UNDER RCW 28A.405.310(7)(c), RCW 28A.405.350 AND RCW 49.48.030.

The Hearing Officer must award reasonable attorneys' fees when the Hearing Officer rules in favor of the teacher in a teacher nonrenewal hearing. RCW 28A.405.310(7)(c) (**App. D**). Should this court reverse the Hearing Officer's Opinion and Superior Court's Order, this Court should also award Mr. Cummings his reasonable attorneys' fees or remand for such an award.

Statutory attorneys' fees are recoverable pursuant to RCW 28A.405.350 (**App. G**) if the Court finds that the District's probable cause determination was made upon insufficient legal grounds. If wages are recovered, statutory attorneys' fees are recoverable pursuant to RCW 49.48.030. This court should enter an award of attorneys' fees and costs in accordance RAP 18.1, RCW 28A.405.310(7)(c), RCW 28A.405.350 and RCW 49.48.030.

VI. CONCLUSION

The Hearing Officer noted in his Opinion, "This is the longest and most troubling case, with more issues, the Hearing Officer has heard during the years he has presided at nonrenewal hearings." (Opinion at 48, CP 116). The Hearing Officer subsequently noted, "Suffice to say, if fairness was the standard by which the Hearing Officer was to decide this case, the outcome would have been different." (Opinion at 65, CP 133).

We respectfully submit fairness includes both substantive and procedural due process to be afforded Mr. Cummings before he was placed on probation, during the probation period, during the decision making process and presentations regarding any proposed non-renewal and during the decision on the non-renewal itself. Mr. Cummings was not afforded the full substantive and procedural due process to which he was entitled during these various stages of this matter. This includes the hearing before the Hearing Officer which was based, as outlined above, on some procedural violations, some erroneous evidentiary rulings and some erroneous legal rulings.

For the reasons stated herein, this Court should reverse the decision of the Superior Court and the Hearing Officer and order that

Mr. Cummings be reinstated to a teaching position with lost pay and benefits from May 12, 2011 to the present pursuant to RCW 28A.405.300, .310 and .350. The rights of Mr. Cummings were prejudiced by the Hearing Officer's rulings. At a minimum, this Court should remand and require the Hearing Officer to take additional testimony. This Court should also award Mr. Cummings all costs and attorneys' fees for the reasons stated herein.

DATED this 28th day of August, 2012.

The Peck Law Firm, PLLC

A handwritten signature in black ink, appearing to read 'K. A. Peck', written over a horizontal line.

Kevin A. Peck, WSBA #12995
Attorney for Appellant, John Cummings

No. 68519-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

APPENDIX A
TO
APPELLANT'S OPENING BRIEF

1
2
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4
5
6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
 IN AND FOR THE COUNTY OF KING

7 JOHN CUMMINGS,

8 Petitioner,

9 v.

10 SEATTLE SCHOOL DISTRICT,

11 Respondent.

No. 11-2-19331-4 SEA

ORDER AFFIRMING HEARING
OFFICER'S DECISION

13 THIS MATTER CAME BEFORE THE Court on February 17, 2012, pursuant to
14 Appellant's Petition for Administrative Review of the May 2, 2011 Memorandum Opinion of the
15 Hearing Officer. The parties were represented by counsel, the Court heard oral argument and
16 considered the pleadings submitted in support of and in opposition to Appellant's Petition, and the
17 Court considered the records and files herein and is fully advised:

19 **1. STANDARD OF REVIEW**

20 The Superior Court reviews decisions of a hearing officer pursuant to RCW 28A.405.340
21 to determine whether the hearing officer's findings of fact are clearly erroneous in light of the
22 evidence presented at the hearing, and the Court reviews the hearing officer's conclusions of law
23 de novo to determine whether or not the hearing officer applied the correct law to the facts of the
24 case. *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 109-10, 720 P.2d 1192 (1997).

26 ORDER AFFIRMING HEARING
OFFICER'S DECISION 1

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue -- C-203
Seattle, WA 98104
(206) 296-9085

1 Based upon the forgoing, the Court hereby enters the following:

2 **2. ORDER**

3 A. There is substantial evidence in the record to support the Findings of Fact of the Hearing
4 Officer including, but not limited to, the following:

5
6 1) That on January 8, 2010, Appellant John Cummings was placed on probation and
7 a performance improvement plan (PIP) pursuant to RCW 28A.405.100 to improve his teaching
8 performance in the areas of 1) Instructional Skill and 2) Knowledge of Subject Matter.

9 2) That at the conclusion of the probationary period, Assistant Principal Keisha
10 Scarlett determined in her professional educational judgment that Appellant did not make suitable
11 progress during probation to remove his deficiencies in 1) Instructional Skill and 2) Knowledge of
12 Subject Matter. This opinion was shared by Principal Sara Pritchett, Education Director Ruth
13 Medsker, Deputy General Counsel Faye Chess-Prentice, and Human Resources Manager Gloria
14 Morris and they therefore recommended to the Superintendent that Appellant's teaching contract
15 be non-renewed.

16
17 3) That Second Evaluator Marilyn Day disagreed with the recommendation of
18 Principal Sara Pritchett, Education Director Ruth Medsker, Deputy General Counsel Faye Chess-
19 Prentice, and Human Resources Manager Gloria Morris, and recommended that Appellant be
20 retained.

21
22 4) That the Superintendent reviewed the evaluations and observations of Appellant's
23 teaching performance by Assistant Principal Scarlett and Second Evaluator Day; the
24 recommendations of Principal Sara Pritchett, Education Director Ruth Medsker, Deputy General

25
26 ORDER AFFIRMING HEARING
OFFICER'S DECISION 2

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue - C-203
Seattle, WA 98104
(206) 296-9085

1 Counsel Faye Chess-Prentice, and Human Resources Manager Gloria Morris before the
2 Superintendent determined that there was sufficient cause to non-renew the employment contract
3 of Appellant for his demonstrated deficiencies in 1) Instructional Skill and 2) Knowledge of
4 Subject Matter and for Appellant's failure to remediate these deficiencies during the statutory
5 probationary period.

6
7 5) That the recommendation of Assistant Principal Scarlett was based upon her
8 professional educational judgment and there was no actual or apparent conflict of interest as math
9 coach and primary evaluator.

10 6) That Appellant was diagnosed with ADHD, but that Appellant's ADHD did not
11 substantially limit his ability to teach math or to deliver the District's mandated CMP2 math
12 curriculum.

13
14 7) That the formal teaching observations of Appellant by Assistant Principal Scarlett
15 and Second Evaluator Day were conducted of Appellant's special education classes that are
16 within Appellant's special education endorsements to teach.

17 B. The Court also finds that the Hearing Officer applied the correct law to the facts of this
18 case including, but not limited to, the following:

19
20 1) That the Hearing Officer correctly determined that RCW 28A.405.310(8) was the
21 applicable standard to determine whether the District established sufficient cause to non-renew the
22 employment contract of Appellant by a preponderance of the evidence.

1 2) That the Hearing Officer correctly determined that Appellant did not make suitable
2 improvements in his math teaching deficiencies during the statutorily required probationary
3 period.

4
5 3) That the Hearing Officer correctly determined that Appellant's ADHD did not
6 substantially limit his ability to teach math and therefore did not trigger a duty of the District to
7 accommodate under RCW 49.60.040(7)(d)(i) or the ADA.

8 4) That the Hearing Officer correctly determined that the District complied with
9 RCW 28A.405.100 during Appellant's evaluation and probation.

10 5) That the Hearing Officer correctly determined that requiring Appellant to teach the
11 CMP2 math curriculum did not violate WAC 181-82-110 or the collective bargaining agreement.

12 This Court is troubled that Respondent would terminate Appellant rather than reassigning him to
13 other duties he was clearly competent in. However, Appellant's special education endorsement
14 required him to teach special education students all subjects, including math. This Court, like the
15 Hearing Officer, does not have the authority to tell Respondent how and where to assign its
16 teachers.

17
18 6) That the Hearing Officer correctly determined that Appellant did not have standing
19 to challenge his non-renewal based upon alleged violations of the Individuals with Disabilities
20 Act (IDEA) because only students and parents have recognized causes of action under the IDEA.

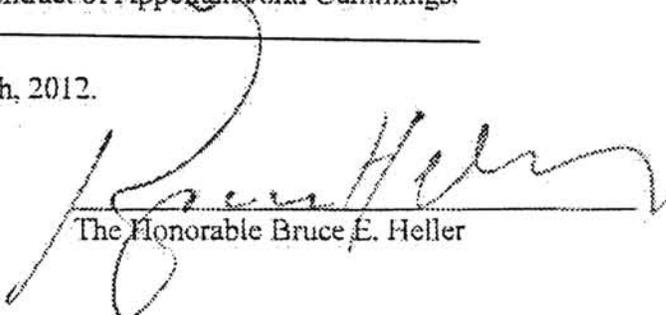
21
22 7) That the Hearing Officer acted within his discretion when ruling on the
23 admissibility of evidence, including the testimony of witnesses, and Appellant failed to present
24 any evidence that this discretion was abused in this case.

1 8) That the Hearing Officer correctly determined that the District demonstrated
2 sufficient cause to non-renew the employment contract of Appellant for his failure to demonstrate
3 sufficient improvement in 1) Instructional Skill and 2) Knowledge of Subject Matter.

4 C. RCW 28A.405.310(10) requires that [a] complete record shall be made of the
5 hearing . . ." The decision by the Hearing Officer to hear portions of counsels' closing argument
6 without a court reporter violated the statute. However, this violation is not a basis for reversing or
7 remanding the case to the Hearing Officer. Appellant has not established any prejudice.
8 Counsels' closing argument, while helpful to the Hearing Officer in understanding the evidence
9 and apply the law, is not evidence. This Court was able to fully assess whether substantial
10 evidence supported the Hearing Officer's decision and whether he applied the proper legal
11 standards, without reviewing closing arguments, including questions asked by the Hearing
12 Officer.
13 Officer.

14
15 Accordingly, the Court AFFIRMS the decision of the Hearing Officer that sufficient cause
16 existed to non-renew the employment contract of Appellant John Cummings.

17
18 DATED this 2 day of March, 2012.

19
20 
21 The Honorable Bruce E. Heller

22
23
24
25
26 ORDER AFFIRMING HEARING
OFFICER'S DECISION 5

Judge Bruce E. Heller
King County Superior Court
516 Third Avenue -- C-203
Seattle, WA 98104
(206) 296-9085

No. 68519-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

APPENDIX B
TO
APPELLANT'S OPENING BRIEF

which identify in greater detail the performance deficiencies listed in her letter. The Superintendent stated that copies of these documents had been provided to Appellant.

Appellant filed a timely notice of appeal. A Preliminary Hearing was held Wednesday, June 11, 2010. Counsel for Appellant advised that his client had waived his right to participate in the hearing and that he also waived his right to have a hearing within 10 days following the Preliminary Hearing. Counsel agreed to have this matter scheduled for a hearing on October 25 and 26, 2010, at the Seattle Public Schools John Sanford Center. Appellant requested that the hearing be open as provided by RCW 28A.405.310 (2).

During the Preliminary Hearing, the the Hearing Officer¹ asked counsel if they would be able to work out a discovery schedule. Counsel answered in the affirmative. The Hearing Officer advised that if any issues arose during discovery which could not be resolved by counsel that a motion should be filed.

On October 7, 2010, during a telephonic hearing, counsel had two "motions" on which they wanted a decision by the Hearing Officer: (1) counsel for the District requested that he be granted a two hour recess on October 26, 2010, to attend a conference ordered by Federal District Court Judge Zilly, at 11 a. m. on that date. (The recess requested was from 10:30 a. m. to 12:30 p. m.); and (2) counsel for Appellant requested that the second day of the hearing be continued to November 1, 2, or 3, 2010, because of the requested recess and because one of his witnesses would not be available the week of October 25, 2010. Counsel for Appellant waived his client's participation in the hearing.

Upon inquiry, counsel agreed with the Hearing Officer that the hearing could not be completed in the two days as scheduled. The Hearing Officer granted the request of the District for the recess; denied Appellant's request to continue the second day of the hearing to the week of November 1, 2010; determined that the hearing would proceed as scheduled and that a third day of the hearing would be held on November 2, 2010.

On October 15, 2010, at 3 p.m. another telephonic hearing was held. Counsel for

¹ Throughout the transcript, the Hearing Officer is referred to as the court or, on occasion, as judge.

Appellant stated that Arden Snyder, Ph.D., his expert witness, would be available to testify at 4:30 p. m. on Monday October 25, 2010, and counsel asked the Hearing Officer to extend the hearing day in order to allow Dr. Snyder to testify. After hearing the arguments of counsel, the Hearing Officer granted counsel's request provided the testimony could be completed in one hour. Counsel agreed with the suggestion of the Hearing Officer that Dr. Snyder's testimony be taken in the nature of an officer of proof, with the objection of counsel for the District be reserved as to the admissibility of the testimony.²

This matter came on for hearing on October 25, 26, 2010, and November 2, 2010. At the close of the hearing day on November 2, 2010, counsel for Appellant had not completed his case. Counsel agreed to continue the case to November 17, 2010. At the close of the hearing day on November 17, 2010, Appellant's case had not been completed. Counsel for Appellant believed that an additional two days would be required for the parties to complete the presentation of their evidence. The Hearing Officer continued the hearing to December 14-15, 2010. The presentation of evidence was completed on December 15, 2010.

After both parties had rested, counsel and the Hearing Officer agreed that the question as to the closing oral argument would be reserved until all briefs were filed. Each counsel requested 30 days to submit a brief. The Hearing Officer established the following brief schedule: upon receipt of the transcript, counsel for the District would have 30 days to file his brief; upon receipt of the District's hard copy of its brief, counsel for Appellant would have 30 days to file his answering brief, and counsel for the District would have 15 days after receipt of Appellant's brief, to file a reply.

The a copy of the transcript was received by the Hearing Officer on January 13, 2011. The District's opening 20 page brief was received by the Hearing Officer on February 4, 2011. Appellant's brief of 122 pages was received on March 1, 2011. The reply

² Counsel agreed that the Hearing Officer need not prepare an order on the pre-hearing motions but that the rulings would be set forth in this opinion.

brief of the District was received by the Hearing Officer, in the mail, on March 17, 2011.

On March 19, 2011, the Hearing Officer received, in the mail, a motion from counsel for Appellant to strike the District's reply brief as untimely, and that attachment 2 to the brief be stricken. Counsel argues that the **hard copy** of the District's brief was due March 16, 2011, and was not received until March 17, 2011. An e-mail copy of the brief was received on March 16, at 4:21 p. m. As far as Attachment 2, a "Certification Handbook", published by the Office of the State Superintendent of Public Instruction, counsel contends that the document was not offered in evidence before the close of the evidence and, in addition, "no foundation has been laid for this submission." On March 23, 2011, the District filed its response. The hearing, by telephone conference, was held on March 30, 2011. After hearing the argument of counsel, the Hearing Officer denied the Motion to Strike the District's reply. The Hearing Officer determined that there was no prejudice in the one day delay in the receipt of the hard copy. Counsel for the District argued that the Certification Handbook was not evidence but additional and supplemental authority citing RAP 10.8. Initially, the Hearing Officer agreed. However, upon review the Hearing Officer must agree with counsel for the Appellant. RAP (Rules of Appellant Procedure) is not applicable in this proceeding. See RAP 1.1 Scope of the Rules.

ER 902 is the relevant rule . It reads as follows:

Extrinsic evidence of authenticity **as a condition precedent to admissibility** is not required with respect to the following:

...

(e)**Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

The Hearing Officer understands the position of counsel for the District that he was responding to an argument raised for the first time Appellant's Post Hearing Brief. Unfortunately, for the District, the close of the evidence was on December 15, 2010, and neither party requested to reopen. The ruling excluding the Certification Handbook also applies

to the "Highly Qualified Teacher Resources Manual" presented to the Hearing Officer during the closing argument by counsel for Appellant.

At the request of Appellant, final arguments were presented in person. The hearing date of April 14, 2011, was agreed upon by counsel. The Hearing Officer stated that each side would be entitled to not more than one hour to complete its argument. Additional time, not more than one hour, was made available for counsel to respond to questions asked by the Hearing Officer.

Prior to hearing the closing oral arguments, the Hearing Officer asked counsel for the District if a court reporter would be coming. Counsel for the District answered in the negative. He was under the impression from the discussion during the "motion to strike" that no court reporter would be required. After some discussion, counsel for Appellant stated his client wanted a court reporter present. Counsel for the District stated that if the Hearing Officer ordered it he would attempt to locate a court reporter. When counsel for the District was leaving the hearing room to make a call, counsel for the Appellant said he would try to find one using his cell phone. The Hearing Officer stated that both counsel should not attempt to contact a court reporter or two reporters might appear. Counsel for Appellant then called a court reporter who was not available but who said she would attempt to contact one and if she was successful the reporter would call counsel for Appellant. When no call was received in the next ten minutes, the Hearing Officer asked counsel to proceed. The Hearing Officer clearly stated that the case would be decided on the evidence and not on the argument of counsel and that the scheduled arguments would not be continued for lack of a court report.

The arguments scheduled for 10 a. m. began at 10:20 a. m. After counsel for the District had used 20 minutes of his time, he reserved the remainder for rebuttal. Counsel for the Appellant commenced his argument and after about 25 minutes, a court reporter appeared to take the remainder of the proceedings. If she had called and said she was

coming, the start of the arguments would have been delayed until she appeared. In any event the remainder of the arguments and comments of the Hearing Officer were then recorded.

At the conclusion of the proceeding, the question was raised as to who should pay for the reporter. After hearing a brief argument, the Hearing Officer reserved ruling. However, on April 15, 2011, the Hearing Officer sent a memorandum to counsel stating that, after considering the matter, the District should pay the fee of the court reporter. The Hearing Officer reasoned that the closing oral arguments, like the opening statements, are a part of the hearing record for which the District is required to pay for the court reporters services, unless the reporter is waived³.

The six (6) day hearing was conducted in accordance with the procedures set forth in RCW 28A.405.310 (7).

The Hearing Officer asked counsel, during the hearing, if the parties were waiving the requirement of RCW 28A.405.310, which requires the Hearing Officer, within ten (10) days following the conclusion of the hearing to "transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision". Counsel and Appellant agreed to waive the ten day requirement.

At the outset of the hearing, counsel for the District made his opening statement. Counsel for Appellant reserved his opening statement until the close of the District's case in chief.

During the hearing, the District, in its case in chief, presented the testimony of the following witnesses: Keisha Scarlett, Vice Principal of McClure Middle School ("McClure"), during the school year 2009-2010, Superintendent Dr. Maria Goodloe-Johnson, Ruth Medsker, Education Director at McClure, Sarah Pritchett, principal of McClure, and Gloria Morris, Human Resources Manager during the 2009-2010 school year.

³ If the Hearing Officer erred in not waiting longer for a court report to call or appear, it is the opinion of the Hearing Officer that there was no prejudice to Appellant because the portion, not reported, repeated substantially what was set forth in the written argument brief of his counsel.

As noted above, Appellant was permitted to present the testimony of Dr. Snyder out of order, during the District's case in chief, because of the difficulty in scheduling his testimony. At the conclusion of the District's case in chief, counsel for Appellant made his opening statement. He then called the following witnesses: Corinne Daycross, a teacher at McClure, Marilyn Day, the second evaluator of Appellant during his probation ; Linda Adler, a special education aide with Appellant during the school year 2008-2009, Patricia J. Steinburg, M.A. Special Education Coordinator, and Appellant.

The District called the following rebuttal witnesses: Amy Valenti, a Human Resources Manager with the District; Demetrice Lewis, Human Resources Analyst, and Keisha Scarlett.

Appellant did not call any surrebuttal witnesses.

The Hearing Officer has reviewed and carefully considered the prehearing briefs, the post hearing briefs, the opening statements and closing arguments of counsel, the 1171 pages of the transcript and all the exhibits admitted into evidence. The opinion expressed herein is based upon all relevant and material evidence presented during the hearing , considered in the light of the applicable law governing this proceeding.

Sufficient Cause for Nonrenewal

RCW 28A.405.310 (8) provides:

Any final decision by the hearing officer . . .to discharge the employee, or **to take other action** adverse to the employee's contract status, . . . shall be based solely upon the **cause or causes specified in the notice of probable cause** to the employee and **shall be established by a preponderance of the evidence at the hearing** to be **sufficient cause or causes** for such action. (Bold print added)

The "preponderance of the evidence" standard of proof simply means the greater weight of the evidence. Paraphrasing Washington Pattern Instruction Civil (WPI 21.01), "preponderance of the evidence" means that the Hearing Officer must be persuaded, con-

sidering all the evidence in the case, that the proposition on which the District has the burden of proof, is more probably true than not true. See, *Peacock v. Piper* 81 Wn. 2d 734, 504 P. 2d. 1124 (1973). See also, *Gayland v. Tacoma School District*, 85 Wn. 2d 348, 350, 535 P. 2d 804 (1995), *State v. Ginn*, 125 Wn. App. 872, 878, 117 P. 3d 1155 (2005) citing WPI Criminal 52.01 (2d ed. 1994) Here, the District has the burden of proving sufficient cause for the nonrenewal of Appellant's contract. In deciding this case, the Hearing Officer must base his decision solely on the evidence presented at the hearing. *Wojt Chimacum School District*, 9 Wn. App 857, 860, 516 P. 2d 1099 (1993).

In *Sauter v. Mount Vernon Sch. District*, 58 Wn. App. 121, 131, 791 P. 2d 549 (1990), the court recognized that "sufficient cause" for discharge or nonrenewal is not defined in the statute but that the general rule in this state may be found in court decisions. In interpreting the Supreme Court decision in *Clarke v. Shoreline Sch. Dist.* 412, 106 Wn. 2d. 102, 113-114, 720 P. 2d 893 (1986) the *Sauter* court concluded:

...the test should be read that sufficient cause for discharge exist as a matter of law: [1] where the teacher's deficiency is unremediable and materially and substantially affects performance, or [2] where the teacher's conduct lacks any positive educational aspect or legitimate professional.

See, also, *Ruchert v. Freeman School District*, 106 Wn. App. 203, 22 P 3d 841 (2001)

Counsel for Appellant contends that the Hearing Officer should consider the eight judicial "factors" applied by the Supreme Court in *Hougland v. Mount Vernan School Dist.*, 95 Wn 2d 424, 429-30, 623 P. 2d 1156 (1981) and by the *Clarke* court (106 Wn.: 2d, at p. 114) in determining whether the District has proven sufficient cause for the nonrenewal of Appellant's contract. The Hearing Officer cannot agree. The eight factors are applicable in every **discharge** case but "not necessarily applicable when the cause for the dismissal is the teacher's improper performance of his duties." (106 Wn. 2d at p. 114)

The *Hougland* case was a misconduct case where he was convicted of grand larceny for purchasing a stolen motorcycle. The decision of the District to discharge the

teacher on that ground alone was reversed because there was no evidence that the conviction affected his ability to teach under the enumerated criteria.

The Legislature has, by statute, established the procedure which must be followed by a school district before a teacher may be nonrenewed for teaching deficiencies. See, *Wojt v. Chimacum School Dist*, 9 Wn. App. 8857, 516 P. 2d 1009 (1973), construing the provisions of an earlier statute. The case was reversed because the teacher had not been placed on probation. The *Wojt* court stated:

Where a teacher is discharged because of classroom deficiencies, the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time, effort and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is reasonably correctable . . .

It necessary follows that [such remediable teaching deficiencies] . . . cannot constitute "sufficient cause" for discharge unless. . .notice and the **probationary procedures are complied with.**
(Bold print added)

Wojt 9 Wn. 2d at 862

The *Wojt* court concluded:

Teaching competence, of course, is the touchstone of the statute. It provides only a means whereby shortcoming can be remedied short of summary discharge. Should the required procedure fail of substantial correction of work related deficiencies, the power of the school board [now the Superintendent] to discharge [nonrenewal of a contract] therefor remains unimpaired.

Under current statutes, the procedure to be followed by a District, in attempting to assist a teacher in remedying any teaching deficiencies, is spelled out in RCW 28A.405.100 (1). The District must prove that it has established the evaluative criteria and procedures for certificated classroom teachers and has complied with the other provisions required by the statute. The evaluative criteria and procedures are set forth in the Collective Bargaining Agreement executed by the District and the Seattle Education Association

for the 2009-2010 school year. Res. Ex. 1, Appendix J-1 and J.-2, pages 132.⁴

RCW 28A.405.100 provides, in part, as follows:

At any time after October 15th, an employee whose work is judged unsatisfactory based on district evaluation criteria shall be notified in writing of the **specific areas** of deficiencies along with a reasonable program for improvement. During the period of probation, the employee may not be transferred from the supervision of the original evaluator. Improvement of performance or **probable cause for non-renewal** must occur and be documented by the original evaluator **before any consideration of a request for transfer or reassignment as contemplated by either the individual or the school district. A probationary period of sixty school days shall be established.** The establishment of a probationary period does not adversely affect the contract status of an employee within the meaning of RCW 28A.405.300. **The purpose** of the probationary period is **to give the employee opportunity to demonstrate improvements in his or her areas of deficiency.** The establishment of the probationary period and the giving of the notice to the employee of the deficiency shall be by the school district superintendent and need not be submitted to the board of directors for approval. During the probationary period the evaluator shall meet with the employee at least twice monthly to supervise and make a written evaluation of the progress, if any, made by the employee. **The evaluator may authorize one additional certificated employee to evaluate the probationer and to aid the employee in improving his or her areas of deficiency, . . .** the probationer may be removed from probation if he or she has demonstrated improvement to the satisfaction of the principal in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her improvement program. **Lack of necessary improvement** during the established probationary period, as specifically documented in writing with notification to the probationer and **shall constitute grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210.**
(Bold print added)

Contentions of the Parties

Counsel for the District contends: (1) that the District established sufficient cause for the nonrenewal of the employment contract of Appellant, as a special education teacher at McClure Middle School, based on the applicable evaluation criteria, (Instructional Skill and Content Knowledge) and the failure of Appellant to demonstrate, during his probationary

⁴ Appendix J-1, sets forth the eight "Evaluation Criteria" for classroom teachers as follows:
Instructional skill, Classroom management, Professional preparation and scholarship, Effort toward improvement when needed, Handling student discipline and attendant problems, Interest in teaching pupils, Knowledge of subject matter and Professional responsibility.

period from January 10, 2010 through April 28, 2010, the necessary improvement in his areas of deficiency, specifically, teaching the District's CMP 2 math curriculum; (2) Appellant's inability to teach CMP2 math was not caused by his ADHD (Attention Deficit Hyperactivity Disorder) and he could not satisfactorily teach such math with or without accommodation.

Counsel for Appellant contends (1) The District did not establish sufficient cause to nonrenew Appellant's contract; (2) The District violated RCW 28A-405.300, RCW 28A.495.310 and WAC 181-82-110 by nonrenewing Appellant's contract; (3) The District violated the Individuals With Disabilities Act of 2004 when it forced Appellant to teach CMP2 math curriculum that was not individualized education for his students; (4) The District violated Appellant's substantive and procedural due process rights, during the probationary period, by having his primary evaluator also act as his math coach which was a conflict of interest; (5) the Superintendent's decision to nonrenew Appellant's contract was predicated on erroneous information that Appellant's disability had been accommodated by the District; (6) The District failed to follow and prove the provisions of the nonrenewal statutes; (7) The District violated RCW 28A.405.100(3)(a) by not providing required and / or timely evaluations to Appellant; (8) The District failed to accommodate Appellant's disability and discriminated against him due to his disability; (9) The District violated Appellant's rights by forcing him to use a single instructional philosophy or technique to teach math to special education students; (10) that Appellant should be reinstated to his position at McClure and he should be awarded his attorney's fees and costs. RCW 28A.405.310 (7)(c)

Credibility of Witnesses

The Hearing Officer is the sole judge of the credibility of the witnesses and of what weight, if any, is to be given to the testimony of any witness. In considering the testimony of any witness the Hearing Officer may take into account the opportunity and ability of the

witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, **the reasonableness of the testimony of the witness considered in the light of all the evidence**, and any other factors that bear on believability and weight.

Narrative Findings of Facts

In this statutory proceeding, like a superior court bench trial, it is not necessary for the Hearing Officer to make findings as to all facts but only the material facts supporting the decision.⁵ However, in this particular case, the Hearing Officer believes it advisable to make more extensive findings in order to provide the parties with a complete record. The Hearing Officer believes the parties are entitled to such a record considering the length of this hearing and the importance of the nonrenewal issue. As stated during the hearing, this proceeding, like a superior court trial, is a search for the truth.

Appellant is forty six (46) years old. He is married and is the father of two children ages eight (8) and ten (10).

He was first certified in the State of New York in 1993 to teach social studies in grades 7 through 12. In that year, he began his teaching at the St. Francis Educational Program in Poughkeepsie, New York. In that program, he taught patients in a mental health unit ranging in grade level from middle school through high school. He held that position until June of 1995,

In 1995 he was certified to teach special education. He taught for the Board of Cooperative Educational Services (GOCES) in Dutchess County, New York, from September 1995 to February, 1998. In that position he taught high school social studies to emotionally disturbed adolescents. He also developed and implemented a behavior management system and directed extracurricular music programs.

Appellant moved to the State of Washington and received a teacher's certificate

⁵ To the extent that additional facts are stated in this opinion in the Conclusions of Law and Decision or in the discussion of the Discrimination claim of Appellant, those facts should be considered as "Findings of Facts".

with two endorsements: special education, kindergarten through grade 12 and history grades 4 through 12. See App.ex 45, 46. With the special education endorsement, Appellant is considered to have the ability to to teach all subjects, including math, to special education students, K through 12th grade,

Appellant began teaching in **March of 1998** at the Lake Washington Individual Progress Center in Redmond, Washington where he taught severely behavioral disoriented adolescents in alternative settings. He developed and implemented curriculum for U.S. History, Language Arts, Geometry, and Consumer Mathematics. He taught at Lake Washington until October 1998 when he was hired as a Special Education teacher at Eastlake High School in Sammamish, Washington, where he developed, implemented and supervised IEP's for 28 students and monitored 504s for 30 students. He developed and taught curriculum for special education classes and, for two years, served as Chairperson of the Special Education. At Eastlake, he developed and taught curriculum for Social Studies, Language Arts, and Mathematics for Special Education classes. Appellant was at Eastlake until June 2004 when he retired due to a severe medical condition. The condition, Sarcoidosis heavily scared his lungs causing him to have trouble breathing deeply. His lungs did not absorb oxygen efficiently.

After going through a rehabilitation program his health returned and he desired to return to teaching. Since he and his family were living in Seattle he applied for a teaching position with the District. Appellant was first hired as a substitute and then when a staff member at McClure took a leave of absence early in the 2006-2007 school year, Appellant was hired as a Special Education teacher. The principal at McClure was Kathy Bledsoe. In the end of the year Evaluation, **dated May 7, 2007**, Ms. Bledsoe made favorable comments of how the Appellant took over a rather disorganized classroom and was able to bring the students together and "create a more positive learning environment in the Classroom". Ms. Bledsoe went on to say:

John Cummings has a kind, caring manner with the students and has worked to get to know the middle school students he serves and to develop positive learning environment in his classroom. He has developed a daily Point Sheet to monitor student behavior. **Lessons are planned with consideration of students' IEP goals and district curriculum. He works collaboratively with staff and parents to develop IEP's.**⁶
(Bold print added)

Ms. Bledsoe gave Appellant an "Overall Evaluation Rating" of "Satisfactory".

App. ex. 13.⁷

Appellant continued to teach at McClure during the school years 2007-2008, 2008-2009 and 2009-2010. Sarah Pritchett was the principal at McClure during those years. Ms. Pritchett is still the principal at McClure. Prior to coming to McClure, Ms. Pritchett was an assistant principal for seven years.

In her end of the year Evaluation, **dated May 29, 2008**, Ms. Pritchett commented that this was the first year that Appellant had worked in "our blended model classes for Language Arts and Social Studies and Math and Science". Ms. Pritchett said that Appellant worked with his co-teachers to create and **modify lessons** and working in the co-teaching model allowed him to become familiar with the general education curriculum as well as being **able to plan and develop individual modifications to address students' individual needs and areas of growth.** (Bold print added) Ms. Pritchett concluded her comments saying:

Mr. Cummings demonstrates an **understanding of what is expected in the development of student IEP's.** He correctly identifies student's special needs and areas of qualification and has been able to effectively support his students **with appropriate accommodations** within the general education classroom. (Bold print added)

Ms. Pritchett gave Appellant an "Overall Evaluation Rating" of "Satisfactory."

App. ex. 40.

⁶ IEP is the Individual Education Plan which must be established for each student in Special Education.

⁷ The form used for evaluating teachers allows the evaluator to check either the space "Satisfactory" or "Unsatisfactory."

During the school year 2008-2009, Sarah Pritchett was again Appellant's evaluator. This was the second year that Appellant taught in the Blended Program. In the "Short Form Evaluation Record" she used, at the end of the school year, **dated May 25, 2009**, she stated that Appellant's overall performance continued to be "satisfactory." App. ex. 35.

Appellant considered the 2008-2009 school year to be "a great year". He found out late in the Spring that the Blended Program was to be discontinued and that was a blow because the teachers were doing so well. At about the same time, the math teacher had been sent home because "the administration had felt that she was having a nervous breakdown". **Appellant had to take over the two math classes which was difficult for him to do.**

During the 2008-2009 school year, CMP 2,⁸ Special Needs Handbook, (Res. ex. 36) was part of the curriculum when Appellant worked with the math teacher. But Appellant was "not involved in a lot of the lesson planning," When asked on cross-examination whether, during the school year 2008-09, Appellant "had co-taught using CMP 2 this book, specifically, Res. ex No. 36", Appellant responded "that book we had used once and I co-taught as the title says but that's not the same as teaching. I did not design those lessons".⁹

At the end of the 2008-2009 school year, Ms. Pritchett, had a discussion with her teaching staff regarding assignments for the 2009-2010 school year. **As the Principal, Ms. Pritchett had the responsibility to make the assignments for the teachers in her building.** Since Ms. Pritchett had dissolved the Blended Program, she had to decide who would be assigned to teach the special education math sections.

Ms. Pritchett met with Appellant and another teacher, Gretchen Nuell to discuss

⁸ CMP2 is the Connected Mathematics Program Part 2.

⁹ **It is notable** that neither Ms. Pritchett nor Ms. Scarlett referred to Appellant taking over the two math classes in the Blended Program in the Spring of the 2008-2009 school year and that the "Special Needs Handbook" was used in that Program. As principal, Ms. Pritchett would have had to make the appointment and Ms. Scarlett, as the instructional leader for math in the building, should have been aware of Appellant's teaching of the two classes of math.

assignments. Initially, Appellant's name was on the assignment sheet to teach language arts and social studies and Gretchen Nuell to teach math. Then, Ms. Pritchett said a mistake had been made and switched the names. Appellant was to teach math. Ms. Pritchett said that Appellant was qualified to teach math and Ms. Nuell was not. Appellant did not ask Ms. Pritchett the basis for her determining that he was qualified to teach math when Appellant believed that math was his weakest subject.

Ms. Pritchett testified that the math curriculum that all math teachers in her building were to teach was CMP2. Appellant testified that he was not told that he would be required to teach his special education classes CMP2; that if he had been told, he would not have accepted the assignment. In June 2009, Appellant had a "job" with the District for the 2009-2010 school year, according to the testimony of Ms. Pritchett, the only question was his job assignment. Appellant did not have to accept the math assignment and could have sought another job with the District.

The reason why Ms. Pritchett selected Appellant to teach the special education math classes was that she believed that Appellant had the experience, the skill and was "highly qualified" to teach CMP2.

Appellant was not happy about the math assignment but he accepted it with the understanding he was to teach the special education classes in accordance with the goals and objectives set forth in each student's IEP (Individual Education Plan)¹⁰

The record does not establish that Ms. Pritchett specifically told Appellant that the District mandated CMP2 math for his special education classes or that he was "highly qualified" to teach math. Counsel for the District did ask Ms. Pritchett: "Q. Did Mr. Cummings tell you during that meeting that he did not wish to teach the CMP2 curriculum for math?

A. No, he did not." There is no evidence that CMP2 math was discussed at that meeting.

¹⁰ Ms. Day "explained that an individualized education plan is a particular child's plan which has to be signed off by the School Psychiatrist, signed off by the parents or guardians and the Administration, stating what the goals are for the child in the areas of Math, Reading and writing and providing clearly stated goals, timelines and strategies attached."

In order to insure compliance with the Federal No Child Left Behind Law, the Human Resources Department of the District conducts internal audits of its 3,000 teachers twice a year to determine that teachers are "highly qualified" to teach the subjects assigned. The audits are conducted the same for each teacher. If a teacher has an endorsement on his or her teaching certificate to teach the subject in question, then the teacher is qualified. When there is no endorsement, Human Resources fills out what is called a HOUSSE¹¹ worksheet. Appellant was not qualified by a math endorsement on his teaching certificate. Therefore, Human Resources had to review his file and fill out the worksheet to determine whether he was "highly qualified" to teach math. Res. ex. 24, (App. ex. 15). Mary Holland, a Human Resource Manager for the District, on April 17, 2009, completed the form indicating that he was highly qualified in "Math". The determination was made on the basis of point total. Appellant was not asked to sign the form and he was not given a copy of it. The District does not require that the teacher sign the worksheet. When an HR Manager fills out the form and the point total reaches 100, as was the case with Appellant, the Manager quit counting because 100 points indicated Appellant was highly qualified. The 100 points under the No Child Left Behind Law means the teacher is highly qualified in the subject not merely barely qualified.¹² Ms. Pritchett did not contact HR to determine what Appellant was qualified to teach. She testified that in the spring, every principal receives documentation from HR about "their teaching staff and **what they're qualified to teach.**" (Bold print added)

At the time Ms. Pritchett asked Appellant to teach the special education math classes she did not know that he had ADHD (Attention Deficit Hyperactivity Disorder).

¹¹ The Housse (Highly Objective Uniform State Standard Evaluation) method of determining a teacher is "highly qualified" to teach a subject, is referred to in the Collective Bargaining Agreement (Res. ex. 1 page 108)

¹² During her testimony, Amy Valenti, was asked "Q. . . . So If someone were to look at this document and say that a person was barely qualified when they reached a hundred, that would be inaccurate? A. That's not NCLB's definition. They define highly qualified as reaching 100 point that are required on this form. Q. So when you reach 100 points, you just stop because the person is qualified. A. Correct".

To prepare to teach math to his special education students, during the 2009-2010 school year, Appellant testified that he spent over 100 hours during the summer doing research to find the appropriate math program. Appellant believed that he would be teaching Intervention Math using RTI (Response to intervention) guides. This was the remedial math that he had always used in self-contained math and this was the math program he began to use at the start of the school year. See App. ex. 54, p. 2.

During the school year 2009-2010, Ms. Pritchett asked Appellant to participate on the Response to Intervention Team ("RTI") which "looks at systems to help students be successful at a social, emotional level." Of the approximately 40 teachers at the school, Appellant was one of the six teachers selected.

After the 2009-2010 school year began, Appellant, on September 21, 2009, sent an e-mail to Ms. Pritchett questioning the decision to place students who had been in the Blended Program the previous year into a special education classroom. Appellant stated that such placement could be seen "as a change in placement to a more restrictive environment". Appellant stated that since the blended model was not officially ended until the spring, **most IEP's had been written with the Blended Classroom in mind.** Appellant went on to say:

The students left for summer still thinking that they would be in the mainstream with the blended class. In reality, it is more restrictive placement in that the students do not interact with gen ed [general education] kids while they are in there. Thought should be given as to how this affects their social-emotional health. . . App. ex. 10.

Principal Pritchett responded that she had to have a conversation with him about his e-mail and asked if Appellant would be available "during 4th period." There is no evidence that Appellant responded or that any meeting ever took place. No further evidence was offered on the subject.

During the 2009-2010 school year, Appellant was assigned to teach three special education math classes, the 6th grade, 7th grade and 8th grade and two math im-

provement classes.

In the 2009-2010 school year Appellant was supervised by Keisha Scarlett, an assistant principal at McClure. It was her second year as an assistant principal at McClure. Presently, she is the principal at South Shore School. Ms. Scarlett is a certificated teacher and administrator. She received her administrator certification in 2008. That certification allows her to evaluate teachers. Ms. Scarlett worked as the instructional leader for mathematics in the building and in that capacity she supervised every teacher of mathematics in the building, including Appellant. As the instructional leader, she assessed where the teachers were as far as implementation of District's math curriculum.

Ms. Scarlett is not certified to teach special education and she never evaluated any-teacher on probation before Appellant.

Before her employment at McClure, Ms. Scarlett was employed for one year by the District as a middle school math coach. Prior to that she was a STAR (staff, training, assessment and review) mentor which meant she was a mentor for secondary middle school and science teachers and middle school and high school math and science teachers. And, prior to that she was a math science of technology teacher at Mercer Middle school from 1999 to 2005.

Ms. Scarlett's education background included: a bachelor of science and chemistry, with a minor in mathematics; a master of education in elementary education, with an endorsement in chemistry and mathematics; and a master's degree in education administration.

As the instructional leader of mathematics, Ms. Scarlett was to assess teachers as far as implementation of the District's math curriculum, setting goals for them , observing their instruction, and giving them feedback and evaluating their performance. The assessments are made in accordance with the Evaluation Criteria set forth in the Collective Bargaining Agreement Between the Seattle School District and the Seattle Education Association.

The Evaluation Criteria are:

Instructional skill

Classroom management
Professional preparation and scholarship
Effort toward improvement when needed
Handling student discipline and attendant problems
Interest in teaching pupils

Knowledge of subject matter

Professional responsibility (Bold print added)

Res. ex. 1 appendix J-1

When Appellant first met Ms. Scarlett, she asked him where he was in CMP with his three special education classes, and Appellant told her, he wasn't using CMP. Appellant had "no idea that there was a mandate for special ed teachers math using CMP." When Scarlett asked him why he was not using it he said "that it takes too long". Appellant did not believe that Scarlett knew "what she was talking about". When his counsel, during direct examination, asked why he said that, Appellant answered:

Well, you know she would not discuss using different methods first of all. That she seemed to think that using CMP and the so called **special needs handbook** that they have would be all that was necessary. . . (Bold print added)..

As stated previously, Appellant testified that he **would not have accepted** the math assignment if he had been told he would be required to teach CMP 2. After discussions with Ms. Scarlett about her wanting him to teach CMP 2, Appellant suggested that perhaps he should teach another class.

. . . I told her again and again and again that I did not feel conformable with the curriculum, that I didn't have enough knowledge to be able to draw on things if we went slightly off topic. I knew that Jason Ihde, who's the EBD (Emotional Behavior Disorder) teacher downstairs, was itching to get out, because he wanted to get some more varied experience, and I offered to switch. I told her that I would be glad to take the EBD program. I'm experienced in that and have Jason take over my classes, and so would just switch and have Jason take over my classes.

Appellant testified that Ms. Scarlett did not respond. There is no evidence that

once Appellant learned he was to teach CMP 2 that he ever raised that issue with Principal Pritchett or asked her for a change of assignment, if indeed, Mr. Ihde was willing.¹³ Appellant testified that Mr. Ihde was his Department Head and was highly qualified in math. Ms. Scarlett, during her testimony, was not asked if Appellant told her that he wanted to switch job assignments with Mr. Ihde. At that time, Appellant was not on probation and could have applied for another teaching position

The Collective Bargaining Agreement, (Res. ex. 1, Art. V111 Sec. A p. 71) reads as follows:

The SPA and the SEA believe that staffing should offer students the teachers **who can best help meet their goals**, promote excellent teaching and allow resources to be expended where they have the highest educational value. The SPS and SEA also believe that school staff should have **a meaningful role in the decisions that effect them.** (Bold print added)

Article V111, section E, page 75, "MID-YEAR TRANSFERS" provides, part as, follows:

1. Employees who accept a position in the spring for the following school year must remain in the new position for the entire year.
5. A mid-year transfer may occur if the employee, SEA and SPS mutually agree to such transfer. Ordinarily, these transfer should occur within two (2) weeks.

Article V111, Staffing, page 76. contains the following provision:

1. c The SPS and SEA may agree that it is in the best interest of the employee, the site, students and the SPS to transfer an employee from his / her assignment or building. When there is such agreement by SPS and SEA the decision is not grievable.

Other than Appellant's testimony that he repeated suggested a transfer to Ms.

¹³There was no mention of any "trade" with Mr. Ihde when Appellant wrote him an e-mail on November 24, 2009. He did state that being prepared for classes was "made slightly more difficult as I have had to rewrite curriculum for three of my classes." He went on to say:

I currently have 5 preps, including 6th grade CMP math and 7th grade CMP math. I am expected to have these lessons in advance for weekly meeting with my administrator. I have never taught 6th and 7th grade CMP before and frankly, I am struggling with it.

Math is, by far, my weakest subject I doubt that my skills are sufficient to pass the 8th grade MSP. I made that very clear when I agreed to take on Sp. ed math and math improvement for this school year. App. ex. 5.

Scarlett after he was told that he was required to teach his special education classes CMP 2 Math, there is no evidence that any effort was made by the Appellant, Ms. Scarlett, the District or the SEA to bring about a transfer.

Ms. Pritchett testified that Appellant never complained to her about teaching CMP2 or having any problems with Ms. Scarlett. Appellant did not testify otherwise.

Observations of Appellant in the Fall of 2009

On October 29, 2009, Ms. Scarlett and Appellant had a preconference and discussed the sixth grade class Ms. Scarlett was to observe the next day. The next day Ms. Scarlett was absent when Appellant presented the class they had discussed.

The next Monday, November 2, 2009, Ms. Scarlett came to observe a 6th grade special education math class without doing any preconference. In her Observation Report, Ms. Scarlett noted under "Strengths" that Appellant had "good relationships with students," and that he had "a strong interest in the socio-emotional well-being of his students and spends time researching this area." Res. ex. 4 p. 3. Under "Areas for Improvement", Ms. Scarlett noted that Appellant was capable of presenting the most basic components of the CMP2 mathematics lesson." However, she stated that Appellant needed "to anticipate potential struggles and have a **modified curriculum** readily available for students".(Bold print added).

In her second Observation Report dated December 11, 2009, Ms. Scarlett under "Strengths" stated that Appellant had built a rapport with his students, that he wanted them to be successful and the students were conformable in his classroom. Under "Areas for Improvement", Ms. Scarlett stated:

As evidenced in the narrative, your lesson was full of misunderstandings, math misconceptions, wrong answers and inappropriate strategies that you supplied.

Under "Instructional Skill", Ms. Scarlett noted that there were not posted or spoken "learning goals to guide instruction", and that the lesson, she felt, was "not well planned

throughout.” Res. ex. 5, p. 3

Mid-Year Evaluation

In her Mid-Year Evaluation of Appellant, (Res. ex. 7, dated January 4, 2010) Ms. Scarlett stated that she had the two formal observations noted above and several other informal observations, that she had met weekly with Appellant during the months of September through November to assist in lesson planning, review learning goals and **special education lesson modifications** and that she identified four areas of deficiency: 1. Instructional Skill, 2. Classroom Management, 3. Knowledge of Subject Matter, and 4. Professional Responsibility.

Under “Instructional Skill”, Ms. Scarlett stated, in part, that Appellant’s lesson plans needed

to be differentiated to meet the **needs of his student’s stated IEP goals and the academic needs of all students. The** pacing of his lessons need to be on target with **his students’ ability level in order to keep them engaged in class..** (Bold print added)

and,

it was evident that Mr. Cummings is still struggling with the basic preparation. **Each CMP2 lesson is provided in the teacher’s manual;** with a specific Launch-Summarize organizational structure. However, this structure **has not been utilized by Mr. Cummings.** His lesson pacing is extremely slow and learning activities do not reflect an organized progression toward skills attainment(Bold print added) .

Under “Knowledge of Subject Matter”, Ms. Scarlett determined:

Mr. Cummings needs to provide clear explanation of content and demonstrate knowledge of best practices. He needs to understand the scope and sequence of the mathematics content. Additionally, Mr. Cummings needs to demonstrate knowledge of each component of the IEP and the ability to provide the appropriate services.

Ms. Scarlett also stated:

Mr. Cummings has not demonstrated a solid understanding of the most **basic content knowledge within CMP2.** He has attended CMP2 training in prior years and during this school year, but does not know the scope and sequence of the subject matter. Mr. Cummings lessons do not reflect specific strategies to assist in their **IEP areas of need. Although CMP2 is the mandated middle**

school mathematics curriculum for both special education and regular program student [s] Mr. Cummings did not use the CMP2 curriculum until required to do so by administration in early October. Although, Mr. Cummings' has received professional development support, resources and instructional coaching support; **his mathematics instruction is filled with mathematical misconceptions and misinformation.** (Bold print added)

Appellant disagreed with Ms. Scarlett's evaluation. Ms. Scarlett concluded that the "Overall Evaluation Rating" for Appellant was "unsatisfactory". Appellant's comment on the Form was "I disagree". Res. ex. 7, p.3.

Probation

Because Appellant's performance was judged to be unsatisfactory, Ms. Scarlett recommended that the Superintendent place Appellant on probation. Her recommendation was approved by Ruth Medsker, the Educational Director at McClure during the school year 2009-2010, and by the Superintendent. Res. ex. 2. See also, Res. ex 3, Probation Process Worksheet. By letter dated January 8, 2010, the Superintendent advised Appellant that she was placing him on probation from January 20, 2010 through April 28, 2010, based upon her review of his evaluator's assessment of Appellant's performance as unsatisfactory. Res. ex. 8. See also RCW 28A.405.100 (1), and Res ex. 1, Collective Bargaining Agreement, Art. X1, sec. F, page 103.

In her letter, the Superintendent stated:

the purpose of the probationary period is to give you the opportunity to demonstrate improvements in your areas of deficiency. You may be removed from probation earlier than April 28, if you **demonstrate sustained improvement** to the satisfaction of your evaluator in the areas of deficiency identified in this letter. ¹⁴
(Bold print added)

The Superintendent then identified the deficiencies in performance as: **1. Instructional Skills**, and, **2. Knowledge of Subject Matter**. The Superintendent further advised Ap-

¹⁴ In the Collective Bargaining Agreement, Res. ex. 1, Art. X1, sec F, page 104, #7, it is stated that:

Upon recommendation of the evaluator, the Superintendent may remove the the employee from probationary status if **satisfactory performance improvement** has been observed and documented.(Bold print added)

pellant that he would be provided with a recommended Plan for Improvement. RCW 28A.405.100 (1). Res. ex. 1 Collective Bargaining Agreement, Art. X1, sec. F, page 104, #4.

Plan for Improvement

The nine (9) page, specifically detailed Plan of Improvement , dated January 4, 2010, was prepared by Ms. Scarlett and submitted to Appellant for impute. Res. ex. 6.. Ms. Scarlett stated:

This Plan for Improvement is intended to assist you and to provide you with the opportunity to demonstrate improvements in the areas which I have specified. Please read the plan carefully. Feel free to make suggestions, additions or modifications. Your suggestions will be carefully considered.

Ms. Scarlett made some revisions at the suggestion of Joan Matheson, Appellant's Seattle Education Association (SEA) representative. The changes made were agreeable to Ms. Scarlett, Ms. Matheson and Appellant.

In the final paragraph of the Plan, Ms. Scarlett indicated that she was open to providing reasonable support to Appellant as he moved forward with the plan. She stated that she had "asked Ms. Ovalies, our Math coach [the District's Math coach] to provide additional support." Ms. Scarlett was Appellant's direct supervisor, math coach, and primary evaluator during his probationary period.

Appellant signed the Plan but did not fill in the space for the date. The form states below Appellant's signature:

Signature indicates that you have received this document and had an opportunity to provide impute.

For every teacher placed on probation, the District assigns a consulting teacher. The consulting teacher appointed by the District to assist Appellant in meeting the terms of the Performance Improvement Plan was Drew Dillhunt. Appellant met with Mr. Dillhunt four or five times. Mr. Dillhunt never refused to meet with Appellant when asked but Appellant could not meet with him more because Appellant was "pretty overbooked as it

was.” It was the Appellant’s understanding that his conversations “Drew” were “confidential”, and Appellant never complained about Drew because he was helping him.

The SEA also hired another teacher to assist Appellant during his probation. Her name was Carolyn Core. Appellant met with her three or four time, not just the two of them, usually Joan Matheson and Drew Dillhunt were there. Ms. Core observed Appellant teaching in some classes. On one day, both Ms. Core and Ms. Scarlett were observing the same class. Appellant talked to Ms. Core as to what she had observed. Ms. Core was not called as a witness.

The Performance Improvement Plan

The **Instructional Skill** portion of the Plan provided, in part, the following: Detailed lesson outlines for all mathematic instruction which must be “focused and coherent”. The lessons needed to be planned and implemented **to meet the IEP goals and needs of all students** in Appellant’s classes. The lesson plans had to be submitted in accordance with the timelines specified. The detailed lessons for all grade levels **needed “to show modification and accommodations for Appellant’s IEP students”**. Appellant was to read “appropriate texts to guide lesson planning such as *How to be an Effective Teacher the First days of school.*” Appellant was to work closely with other math teachers to gain understanding of student misconceptions and ways for correction and keep a notebook as to what went well and what needed to be addressed.

The **Knowledge Subject Matter** portion of the Plan provided, in part, the following: Students needed to be provided with clear explanation of content material in order to understand. Appellant was to observe other classrooms to determine ways in which teachers provide clear explanations and to carefully **review CMP2 unit in teachers manuals**. If the explanation given by Appellant is not understood by students, the explanation should be restated in other words and students then asked questions designed to determine the source of the confusion so that Appellant’s reformulated explanation addresses

such confusion. Appellant was required to demonstrate a knowledge of each component of the IEP needs of students, the ability to correctly develop IEP's in a timely manner, and how to provide appropriate services. Appellant was advised that "evidence of progress" would be shown when the IEP's he prepared were written appropriately with correct levels of services, accommodations and measurable student goals.

First Observation by Keisha Scarlett During Appellant's Probation

Ms. Scarlett's first observation of Appellant's teaching, during his period of probation, was on **January 28, 2010**. Res. ex. 9. Ms. Scarlett noted, as she had stated in her observations prior to the Mid-Year Evaluation, that Appellant had build a good rapport with his students and that they feel conformable in his classroom. In the "Areas for Improvement" Ms. Scarlett stated that from her observation **Appellant was unfamiliar with the math content that he was teaching**, that there were errors in Appellants partial explanation of the warmup; that Appellant's lesson was filled with mathematical errors and Appellant sent mixed messages around the lesson goals and what students should be able to do at this point in their 7th grade mathematics experience, that it was evident to Ms. Scarlett that Appellant did not have a complete understanding of the curriculum that he was teaching and that his lack of understanding was harmful to the students, and that both from the lesson plan and instruction that she observed reflected a minimal amount of attention to preparation and basic middle school math content knowledge.

It was noted that Appellant did not attend the pre-conference as scheduled or the rescheduled conference. Also, that Appellant refused to meet with Ms. Scarlett for a post conference and refused to sign the Observation Report Form.

Two days after Ms. Scarlett's 1st observation, Appellant, on January 30, 2010, wrote a four page letter to the Superintendent., asking that the Superintendent reverse her decision placing him on probation. At the outset of his letter, Appellant stated that "Keisha Scarlett's written evaluation of me [dated January 4, 2010, Res. ex. 7] is nothing short of

defamation of character.” Appellant went on to say:

She has misrepresented me to the point where I am a caricature of myself, a buffoon idly strumming my guitar while my students sit helpless with blank pages on the desks in front of them. I have **no intention of abiding by her evaluation or the “improvement plan” that she has developed.** . . (Bold print added)

Res. ex. 27, App. ex. 26.

Appellant went on, in some detail, to “set the record straight”. He advised the Superintendent, that:

I am not a math teacher. I just learned last week, while entering an absence in the employee self service web-site, that I am listed as Highly Qualified in math. **Nothing could be more ridiculous** While it is true that I co-taught 8th grade math for two years in the Blended Program, I didn't do the overwhelming majority of instruction. **My math skills are basic at best,** and while I have worked with special education students on their goals and objectives in math, I am not capable of teaching beyond pre-algebra or the simplest geometry. In fact, **my ignorance served me well** as I struggled with the kids to make sense of box and whisker plots, or $y=mx+b$. . . (Bold print added). .

Appellant went on to say:

Last year, When Sarah Pritchett dissolved the Blended Program at McClure, she chose me to teach the special education math sections (plus. gen. ed. math improvement) because am very effective when working with hard-to-teach students. I reluctantly agreed. I was not told that I would be *mandated* to teach CMP2 nor that I would be dropped to the performance cycle. **If i had been told that would be the case, I would not have accepted the position.** . . (Bold print added)

The Superintendent was advised that Appellant had been diagnosed, ten years ago, with Sarcoidosis, and more recently with ADHD. He informed the Superintendent that after his diagnosis of ADHD he began taking medication and that he was “pursuing accommodations through 504 b.[See Res. ex. 1, p. 78 of the Collective Bargaining Agreement] He told the Superintendent that he is well trained and highly skilled at working with some of the toughest to teach. In asking the Superintendent to reverse her decision, Appellant stated:

I would like to finish out the year with my kids and move to one

of the schools in the south-end or central district where I can be most useful. I would have been an excellent fit for the Washington Middle School position **that had opened up a month or so back. I am an excellent Sp. ed LA/SS [Special Education Language Arts / Social Studies] teacher** (Bold print added)¹⁵

Though not indicated on the face of his letter to the Superintendent, Appellant testified that he sent copies of his letter to Ruth Medsker, Marny Campbell, director of special education, Sarah Pritchett, Keisha Scarlett, and Joan Matheson, his union representative. There is no evidence that any of the named individuals received a copy. Ms. Medsker, Ms. Pritchett and Ms. Scarlett were not asked during their testimony whether they had received a copy. As far as Ms. Pritchett and Ms. Scarlett are concerned, it appears that they first learned about Appellant's 504 request when they received information from the Human Resources Department in March, 2010.

The Superintendent did not respond to Appellant's letter though she said she read it. She did not take any steps in response to the letter because, she testified, "As evaluator, that would not have been appropriate". However, Demetrice Lashon Lewis, a senior Human Resources Senior analyst, after receiving a copy of Appellant's letter, initiated a call to Appellant to determine whether he was requesting a 504 accommodation. See Res. ex. 35 , 35A and 35B The issue regarding "SECTION 504 OF THE REHABILITATION ACT OF 1973." will be discussed later in this opinion.

Although Appellant advised the Superintendent that he had no intention of abiding by Ms. Scarlett's Plan for Improvement, (also referred to as a Performance Improvement Plan ("PIP") he changed his mind when he was advised by the Seattle Education Association ("SEA") that if he failed to proceed with the Plan for Improvement that would be grounds for termination.

¹⁵ If Appellant was correct as to when the Washington Middle School position opened up, and for which he would have been "**an excellent fit**" (Bold print added), he could have applied for that position **because he was not then on probation**. The letter of the Superintendent, dated January 8, 2010, placed the Appellant on probation "from January 20, 2010 through April 28, 2010".

Additional Observations by Ms. Scarlett during Appellant Probation.

In her 1st Progress Report for February 2010, dated February 10, 2010, (Res. ex. 10), Ms. Scarlett, initially noted, that there had been some minor improvements in Appellant's performance, however, Appellant's "performance is not at the level that I would expect a veteran teacher to be." She went on to say, in part, that Appellant had not demonstrated consistent improvement in the area of lesson planing development and delivery; that his lessons lack differentiation in order to meet the needs of his students' stated IEP goals and academic needs" and

Through my observation and or meetings you verified that you do not know the subject matter that you are assigned to teach. Your revelation is surprising due to the fact that you co-taught and made accommodation for 6th grade mathematics in previous years.

In the OBSERVATION REPORT FORM, dated March 2, 2010, Ms. Scarlett first noted that Appellant had built a rapport with his students; that they feel conformable in his classroom and that his extra effort had helped provide an orderly work environment for students.

Regarding "Areas for Improvement" Ms. Scarlett said that it appeared that Appellant had reviewed the curriculum materials prior to teaching them in class. However, she said she was seeing a need to work on writing a more complete lesson plan. She then stated:

Though your lesson goal did connect with this lesson as written, the lesson activities were not related. The lesson was still not planned out.

In her OBSERVATION REPORT of March 16, 2010, Ms. Scarlett, in effect, restated what she said had been Appellant's "Strengths" in her report of March 2, 2010. In "areas for Improvement" Ms. Scarlett stated "Your lesson goals connected with lesson activities. You asked students a series of questions throughout the lesson and attempted to involve most students in the discussion." However, Ms. Scarlett then went on to say "I

am still seeing that there needs to be improvement in lesson pacing, organization, formative and basic instructional supports". Regarding "Knowledge of Subject Matter", Ms. Scarlett stated

It seems that you are reviewing the materials in advance and "Did the Math" on this problem. While, I know that you may be modifying the curriculum and pulling out the big pieces, your pacing within this unit of study is extremely slow.

Res. ex. 12.

In her second progress report (Res. ex. 13) Ms. Scarlett noted that Appellant's performance in some areas had improved but she pointed out, among the areas for improvement:

I. **Instructional Skill**- specifically lesson planning, teaching for understanding, differentiation, and placing of instruction.

III. **Knowledge of Subject Matter**- specifically providing clear explanation of content; knowledge of pedagogical practices, knowledge and understanding of the development of an IEP.

The next "OBSERVATION REPORT FORM" is dated April 13, 2010. Res.ex.14 Again,Ms. Scarlett notes the rapport Appellant has built with his students and it "is obvious that you care for them and that they feel comfortable in your classroom. ." Ms. Scarlett said that it was apparent that Appellant had reviewed the materials and established learning goals prior to the lessons. However, she went on to say:

There were no classroom or notebook supports available or referred to prompt students who are cognitively challenged. This was disappointing, because when called upon to sub in your classroom the prior week, I left two public records of support to used as models to support skills acquisition. I am concerned that there are still no support structures, with the exception of your individualized support, in place to assist students in working independently. You need to look to the strategies modeled in **the special education math studio classrooms** and in our planning discussion. . .(Bold print added).

On her "OBSERVATION REPORT FORM", dated April 21, 2010 (Res. ex. 16) Ms. Scarlett again notes as one of Appellant's "Strengths" his rapport with his students. Under "Instructional Skill", Ms. Scarlett recognized that the "lesson was well structured and

the pace was well suited for the time period. Students were kept busy during the entire lesson.” Ms. Scarlett expressed concern again that there were no classroom or notebook supports available or referred to prompt students who are cognitively challenged.¹⁶

In her Progress Report, dated April 26, 2010, (Res. ex. 17) Ms. Scarlett states that while Appellant’s performance in some areas had improved, he struggles to sustain it. She said: “Your performance is not at the level that I would expect it to be at this time. There has been no consistent improvement in all areas identified in your Plan for Improvement. Ms. Scarlett goes on to say: That basic instructional supports for a mathematics and IEP classroom are not in place” Appellant’s lessons continue to” lack differentiation in order to meet the needs of his students’ stated IEP goals and academic needs.” Regarding “Knowledge of Subject”, Ms. Scarlett states; in part,

. . .the issue of specific content knowledge comes across in your lesson development and delivery. Your lessons seem that you are operating without basic understanding of concepts being represented. Because, you don’t know the mathematical trajectory of concepts or precursory mathematics, you are not able to clearly articulate what your students will know and be able to do as a result of the lesson. I still see no evidence of any formative assessment data gathered to make instruction next step. . . .

Under “Professional Responsibility” Ms. Scarlett stated, in part,

. . . According to District IEP compliance records you have multiple months of IEP not being completed in a timely manner, thus costing the school district special education funding.

According to I Can Learn usage reports for the year, you have never implemented this necessary part of our mathematics intervention program in your math improvement classes. Your students were never given structured daily mathematics intervention instruction and have spent an entire year working on MSP practice questions. While many students in the other mathematics improvement classes have completed upwards of forty lessons, your students have not engaged in any. I Can Learn Instruction to improve their number sense, basic skills and problem solving. Our mathematics Intervention program is an integral part of our

¹⁶ In her Pre-Conference “ note Ms. Scarlett wrote:

We conferenced at 11:40 a. m., on April 21st, you gave me a lesson plan and we reviewed the lesson for context, expected student outcomes and special education modifications.

school Improvement and Performance Management Plan. Your failure to implement this program is a direct violation of our Performance Management Plan and is a disservice to the vulnerable Level I math scoring students that have been entrusted to your instruction.

In her final evaluation report, dated April 30, 2010, Ms. Scarlett stated that Appellant had not demonstrated a solid understanding of the most basic content knowledge within CMP2. She also stated:

Mr. Cummings' caseloads of IEP's are date-revised carbon copies of the previous IEP teacher Sherry Studley. Understanding and using an IEP to meet student goals is a foundational requirement of every special education teacher.

During this probation period, I believe that Mr. Cummings has worked on developing his skills in the evaluation areas; **however, he still has significant deficits in his instructional skill and knowledge of subject matter that adversely affects student learning in his classroom.** (Bold print added)

Ms. Scarlett gave Appellant an overall evaluation rating of "unsatisfactory".

Appointment of Second Evaluator

The record does not show the exact date that the second evaluator was appointed. While Ms. Scarlett, as the primary evaluator, had the statutory authority to "authorize an additional certificated employee to evaluate" Appellant and to aide him in improving his areas of deficiency, (RCW 28A.405.100 (1)), she did not exercise this authority. Gloria Morris, the District's Human Resources Manager who serviced McClure during the 2009-2010 school year, assigned Marilyn Day, as the second evaluator .

The assignment was made sometime **prior to February 9, 2010**. That was the date of the e-mail Ms. Day sent to Appellant advising him of her "assignment". Ms. Day informed Appellant of her background and advised him that she had received a copy of the Plan of Improvement. Ms. Day further advised Appellant:

I will do at least five observations of your instruction, so will need to meet with you as soon as possible in the next few days to set up a schedule for pre- and post-conferences as well as deciding which periods I will observe. I can come during your prep period and / or after school. As a third choice, before school. You are wel-

come to invite your union rep to attend our first meeting.

Ms. Day worked for the District for twenty-two years before retiring. She has a Masters in Education from the University of Washington and a Washington State Continuing Principal certificate. Ms. Day served as an Assistant Principal at Garfield High School for three years; Principal at Roosevelt High School for five years, and Principal of Washington Middle School for seven years at which time she retired from the District.

Following retirement from the District, Ms. Day worked for the Office of the State Superintendent of Public Instruction as an evaluator, as a School Auditor for The No Child Left Behind Act, and has supervised student teachers for Seattle University. In addition, Ms. Day has served as a Principal Substitute for the District and, for the last four years, as a Second Evaluator for teachers on probation.

While a principal for twelve years, Ms. Day evaluated 30-40 teachers a year. Since she retired she has served as a Second Evaluator for the District seven times.

Probation Observation I App. ex. 57

Ms. Day met with Appellant for the first time on February 12, 2010, at which time they selected the dates for the first three observations, including pre--and post-conferences.

Appellant told Ms. Day he was not a math teacher and did not "understand his assignment to math classes--that he has had experience as a co-teacher in special math classes, but the other teacher took the lead in lesson planning and instruction.". Appellant also advised Ms. Day that he believed

that curriculum / lesson planning **using CMP** are the most serious issues **in the Performance Plan** and that he would not be on probation if not for these issues. He said he is a Social Studies teacher and has had stellar evaluations until he was assigned Math classes.

Mr. C said he doesn't know how he can meet expectations to use CMP. He is to use modified CMP and stick to the building's timelines. (Bold print added)

When asked by Ms. Day if he had been using the CMP at all this year, Appellant

replied "honestly basically no" . Appellant emphasized that CMP, in his opinion, does not meet the basic needs of his students. There is no evidence that Appellant told Ms. Day that when he taught in the Blended Program for two years that CMP2 was the math curriculum, that the Special Needs Handbook (Res. ex. 36) was used and that for sometime in the Spring of 2009 he was responsible for teaching two Math classes when the Math teacher was sent home.

As far as lesson design, Appellant told Ms. Day that she would observe a lesson from CMP, but he did not expand on what it would be or look like.

Before her first observation, Ms. Day received the lesson plan on the evening of February 22, 2010.

The first observation occurred on February 23, 2010 which was the 5th period, Special Education 6th grade math. Ms. Day's extensive notes were e-mailed to Appellant the evening of February 23, 2010. The post-conference took place on February 24, 2010, from 11:05 to 12:30 p.m.

Ms. Day noted that at the outset of the class Appellant handed out books and asked students to fill out book cards. Appellant did this because this was the first CMP book he had given students . Ms. Day reminded Appellant that the PIP required him to provide accommodations for those students and how he might have done this with the book cards.

In her notes regarding a "pre-test" Ms. Day said:

* Mr. C tells me he gave the students the CMP pretest on Monday, but didn't get it corrected.

*Why? Because I was getting ready for today.

* Me. When asked, you summarily dismiss CMP as being too hard for your students how can you prove this if you don't even look at the pre-assessments?

* Mr. C. I 'll correct them tonight.

*Me. You cannot do proper planning and modification if you don't know where the students are. . .

Ms. Day complimented Appellant on "his obvious rapport with students and the respect they show him. No discipline issues were observed."

Probation Observation II App. ex. 58

The next (2nd) preconference took place on March 10, 2010. The conference started a little late because Appellant had spent the day "observing SPED Math at Madison M.S." **At Madison, Appellant was "extremely impressed with what he'd seen the teacher do."** Appellant **"had come away with some good ideas, but wished he personally was more conformable with the materials."**

The class that Ms. Day was to observe on March 11, 2010, was Appellant's 7th Grade Special Education Math class. The class was in CMP Stretching and Shrinking.

When asked by Ms. Day his current view of CMP for special education students **"he said he was moving toward liking the text, but reserving his final opinion. . . "** (Bold print added)

The Post-Conference was held on March 12, 2010, Appellant said he was more than pleased at how the previous day's lesson had gone. They were meeting during Appellant's fourth period which was his prep time. And they were continually interrupted by other teachers and students walking in. Even after the door was locked students tried to enter.

Ms. Day told Appellant that "his prep time is sacrosanct"; that he is lucky that it's in the middle of the day and Appellant should be using this time to regroup, reorganize focus. Ms. Day reinforced to Appellant "that everything he does: lesson design, and delivery, routines, classroom organization, setting personal boundaries, it needs to be done every day and in every period."

Again, Appellant shared with Ms. Day how impressed he was with the **Madison teacher** he had observed "good, easy rapport [with] students, but firm timelines, direc-

tions, orderly classroom.”. Appellant said he “picked up ideas that he will use.”¹⁷

In response to a question asked by Ms. Day at the close of the post-conference, as to what Appellant was “thinking / feeling at that moment”. Appellant answered “it felt good”.

Probation Summary report One. John Cummings, Special Education Teacher, Mathematics 6-8, McClure MS

In the report written by Ms. Day to Gloria Morris, Manager, Employee / Labor Relations, dated March 15, 2010, Ms. Day stated that she had completed formal observations of Appellant and the second delivery was much better than the first. Ms. Day noted however, that Appellant had “not been totally straightforward with me in several instances” Ms. Day went on to say:

Mr. Cummings continues to stay away from full implementation of the CMP math curriculum. The CMP series teachers’ manuals have everything needed to deliver good lessons including warm-up, examples, correct processes, suggestions for a variety of learning strategies and accommodations. I would say **that even a teacher a bit shaky in math could, if he / she stayed a few days ahead of the students, deliver these lessons satisfactorily.**
(Bold print added)

Probation Observation III App. ex. 59

The preconference took place on April 6, 2010 from 11 a.m. to 12:15 p.m. in Appellant’s classroom They scheduled her observation of the 6th period and 8th grade classes on April 8, 2010.

Appellant expressed frustration that the “primary evaluator” expects him to move along and maintain good pace with the curriculum when his own belief is that he needs to slow down and hope students get more in-depth instruction. He said it is very difficult to just move along when students have so many gaps in instruction.

Appellant attempted to attend a CMP Studio Day with the the Math Coach but had to leave Denny because there was not a sub for him in his building. Appellant told Ms. Day that “roles can be confusing as his primary evaluator is also the math coach and the

¹⁷ There is no record of whether the math teacher who impressed Appellant at Madison Middle School had a Math endorsement or was determined to be “highly qualified” using the Housse method.

building assistant principal”.

After Appellant expressed frustration with the primary evaluator, Ms. Day suggested that “he carefully read evaluations, reports, and / or any e-mails or letters he gets” and then, if he disagrees with what is said, or feels there is another point-of-view, he should write a respectful response to the writer and ask to have his response attached to the report, etc. . . .”

When Ms. Day arrived on April 8, 2010, to observe Period 6, Grade 8 Special Ed Math, she had not received any lesson plan.

Ms. Day and Appellant met in his classroom from 11 a.m. to 12:10, on April 12, 2010, for the post-conference. On her way to his classroom she observed the conduct of students that she brought to his attention. Regarding two boys who left class without permission, Appellant said he would deal with it. He said if he called security, or the office, the boys would get suspended and for one boy it would be long because he had been suspended before. Appellant recognized he might get in trouble for it but said “I cannot change who I am.”

Appellant repeated what he had said earlier, “The math is hard for the students and it’s especially hard by 6th period when they’ve run out of steam and energy. By definition, paying attention to details is hard for them.” Appellant explained that “constant suspensions, illnesses, etc is extremely disruptive to the curricular flow.” He expressed the frustration “he feels to deliver at a good pace curriculum to students who are unfocused, lack of the basic skills, have spotty attendance.” He added that “The teacher’s edition helps with curricular modifications, but doesn’t tell you what to do when the kids are gone for 10 days at a time”..

Under the heading “Feedback”, Ms. Day stated:

Mr. Cummings is not moving through the CMP materials at the pace he is expected to maintain. I’m thinking that there are several contributing factors:

- o His own perceived lack of Math skills+continuing tensions about his ability to deliver Math content.
- o A Math endorsement based on co-teaching classes rather than actual academic preparation
- o Planning with the Math coach (2nd evaluator) that falls apart between the planning stage and the actual delivery of the lesson
- o Inconsistent class make-up because of student's suspensions, absences, and behavioral issues.

Ms. Day then observed that she had seen "evidence in this lesson that the students were getting it." And, that classroom management was a strong area for Appellant¹⁸ --"Nice feeling tone in classroom, patient, supportive."

Probation Observation IV App. ex. 60

Ms. Day and Appellant met promptly at 7:30 a.m. on April 21, 2010, in Appellant's classroom. The observation had been scheduled the day before but Ms. Day missed it. The class observed was 7th grade Special Ed Math. No written lesson plan was provided.

Appellant did provide Ms. Day with a copy of students pre-test for CMP Moving Straight Ahead. He also told her that the class finished Stretching and Shrinking yesterday and that he reported that the students did "okay" on the post test. In retrospect, Ms. Day said that they should have discussed this more.

The post-conference was scheduled at 11 a.m. on Friday, April 23, 2010, in Appellant's classroom. Ms. Day was 25 minutes late because she had "**an impromptu meeting with the McClure Principal**" (Bold print added) No evidence was offered as to what was said.

Appellant told Ms. Day that he had to "own up". He said the class was a disaster- a bad lesson- because he started with the wrong book. Appellant decided to go ahead because Ms. Day was observing. **This observation was seven days prior to the end of probation on April 28, 2010.** Ms. Day reminded Appellant that lesson planning for

¹⁸ Classroom Management was not one of the two reasons Appellant was placed on probation. Res. ex. 8.

every class every day was a critical part of his PIP. Appellant agreed saying "it is very challenging for him to get into the flow of curriculum planning for three classes. Planning in the morning with so many distractions."

Ms. Day complimented Appellant on his classroom's appearance and good visuals, and the nice feeling tone between Appellant and his students. Ms. Day suggested that Appellant continue to focus on pacing: clear transition, word definitions, closure.

Probation Observation 5 (App. ex. 61)

The fifth and final preconference was held at 11 a.m., April 26, 2010, at Appellant's classroom. Appellant said that Ms. Day would observe his 6th grade Special Education Math Class in their last unit of The Covering and Surroundings book, Squaring a Circle. Appellant showed Ms. Day the unit and said the students were still having difficulty understanding the difference between area and circumference. Appellant pointed to a visual that showed the difference. He also pointed to a visual that showed both and gave formula. Ms. Day observed that the lesson suggested having students cut out squares. Appellant promised an e-mail adapted lesson plan.

Ms. Day and Appellant spent some time discussing the PIP. She asked for his input and reflections to help her write her final recommendation.

When Ms. Day arrived for the observation she was handed the lesson plan. There was also another adult present "introduced as SEA observer".

After the lesson, Ms. Day and Appellant met on April 29, 2010, for their post-conference at 11 a. m. in Appellant's classroom. When Ms. Day asked Appellant what he thought about the lesson he said "he- as usual- didn't get as far into the lesson as he wanted; that the concepts are hard for the students, but they are beginning to understand area of a circle and he said "the SEA observer teacher told him she was unfamiliar with CMP, but felt there wasn't enough direct instruction of these special ed students. . .".

Since this was their last observation, Ms. Day and Appellant spent some more

time going through the various sections of the PIP to give her “feedback for the final write-up.”

Final Probation Summary Report (App. ex. 56)

In her final four page report, Ms. Day did “not recommend termination of this teacher”. Under “Instructional Skill”, Ms. Day states “Mr. Cummings has consistently claimed he is **not competent to teach CMP math.**” While she noted that there “has been evident improvement the last three classes¹⁹,” she had to “agree that **his math skills are minimal.** And because he does not grasp the scope and sequence of CMP content, he is **not competent to modify this content.**” (Bold print added)

Ms. Day said she was told by Ms. Scarlett that Appellant filled out the application for Highly Qualified in Math, it was granted and that he was expected to “deliver modified CMP in a competent manner” Ms. Day said the application form was filled out by someone other than Appellant. Ms. Day went on to say that the form qualified Appellant “to teach Special Education math **by the barest minimum amount of points.**” (Bold print added)

Ms. Day states that Appellant told her that

...he thought that when the McClure blended model was dissolved he would be teaching Intervention Math to the Special Ed students using RTI (Response to Intervention) guidelines. This is remedial math and what he’s always used in self-contained math. He says he was told after school started that he would teach modified CMP.

Under “Instructional Skill re. Recovery Classes: Ms. Day stated

I am mystified and have told Mr. Cummings so about these **classes and why he hasn’t taken students to the computer lab. Mr.** Cummings really doesn’t have an explanation for why he hasn’t taken the students. He thinks it’s because preparing for his other three classes and moving these two classes back and forth is just too much. He says he likes helping these students with basic skills and they are studying the MSP.

Under “Instructional Skill: Differentiation of Instruction”, Ms. Day said:

¹⁹ Ms. Day stated that there was evident improvement in the last three class. However, her notes of the class on April 21, 2010, states that Appellant said that the “class was a disaster-a bad lesson .”

There has been improvement in this area. Mr. Cummings is getting better, particularly with the 6th grade materials, in adapting the lessons. **He credits assistance from the Math Coach** in helping him with this. His use of manipulatives in the 5th observation is particularly noted.

Regarding pacing of instruction, Ms. Day stated that there “has been some improvement as classroom routines have been better established, but he has not completed the number of CMP lessons expected.”

Under “Knowledge of Subject matter: Providing Clear Explanation of Content” Ms. Day states:

Mr. Cummings has improved in this area with the lower level curricula. However, his own Math deficiencies show at the pre-Algebra level.

From the very beginning, it has not been logical to me that a teacher, being observed and on probation, would deliberately give students the wrong methods or wrong answers.

Given what I know about his lack of academic preparation to teach CMP math, I believe it is unrealistic to expect clear explanations of content from someone who does not have the academic background to master the curricula.

During the last three observations, there was good student participation and evidence that the students were “getting it.”

Under “Knowledge of Subject Matter: Knowledge of Pedagogical Practices”, Ms. Day noted some improvement. She went on to say “ Mr. Cummings **credits coaching for helping him with this.**” (Bold print added) On the other hand, Appellant agreed that he had not attended and / or participated in all the training, professional development in the PIP. The coach she was referring to was the District Math coach. There is nothing in the record as to how many times Appellant met with the District Math coach.

Regarding “Special Education”, Ms Day found Appellant had a great connection and understanding of his students’ challenges. “He listens, calms, redirects, praises and validates.”

When asked by counsel for the Appellant, during direct examination, what point

she was trying to make in that portion of her Final Report, Ms. Day responded:

The point that I was making there is that this man, in my professional opinion, **is a gifted special education teacher**. I saw him able to handle very challenging, difficult students and calming them. redirecting them, praising them validating them. And I made a note somewhere in here that if I had a special education child or grandchild, I would like them to have him as a teacher, especially at middle school, such a difficult age level. I saw this man as a **competent special education teacher. Not competent CMP math teacher, but a competent special education teacher**. And that's why I said that I did not support nonrenewal. (Bold print added)

Ms. Day did not have information to determine whether Appellant's IEPs were up to date. Appellant claimed they were. The "primary evaluator disputes this assertion."

In her "**Final Recommendation**", Ms. Day states

It has been extremely difficult to assess this teacher **because his lack of proficiency in mathematics was apparent from the beginning. He has and is continuing to struggle with this curricula.**

I do not recommend termination of this teacher. I have seen enough change and growth over the past few weeks to believe that **Mr. Cummings is really trying and has the ability to improve.**

If I had a child or grandchild who qualified for Special Education, I would very much like for him or her to have a contact or class with Mr. Cummings. He is excellent at being a safe place touchstone for these children and for providing the emotional and social support needed.

I am puzzled, given his questionable and patently thin qualifications, why this teacher was expected to teach three different levels of modified CMP math. In addition, he was given the two remedial classes. **If they are expected to master CMP concepts, the special students deserve an academically qualified teacher to deliver this curricula.** (Bold print added)

If possible, Mr. Cummings needs another probationary year to see if he can apply what he learned this year to providing quality instruction in every class, every period. Ideally he would have a reasonable amount of preparation in his academic areas-Special Ed and History. **He absolutely should not be given math classes above the basic skills ordinarily taught in direct instruction, self-contained classrooms.** (Bold print added.)

During her testimony at the hearing, Ms. Day stated her opinion that CMP2 should be taught by a teacher who has a college degree in Math and an endorsement in Math. On cross-examination, Ms. Day acknowledged that Appellant, with a special education endorsement K- 12, could be expected to teach his students math within her “understanding of what the math is for a special education classroom he would have the ability to teach it. . . .” Counsel then asked: “Q, CMP2 math curriculum has a specific section for special education, doe it not” A. Yes, it does. I actually have it with me. Q. And during the course of your evaluations of Mr. Cummings, you expected him to use those materials, did you not? A. Yes. Q. And he didn’t , correct? A. No. he didn’t.” Ms. Day later explained why Appellant could not use the Special Needs Handbook to modify the curriculum to accommodate the IEP needs of his special education students. Ms. Day testified that “You can’t modify something if you don’t know how to teach it, and so now I understand why he was avoiding the materials. You have to understand how to do ratios before you can modify then to teach them to a special education student”.

When asked by counsel for the District regarding her statement in her March 15, 2010, report, Ms. Day testified that when she said even a teacher “ a bit shaky in math could if he or she stayed a few day ahead of the students deliver these lessons satisfactoraly”, she was “operating on the assumption. . . that this is a math endorsed teacher.”

In response to a question by counsel for Appellant, Ms. Day testified that she believed that there was a conflict of interest in Ms. Scarlett being Appellant’s evaluator and math coach.

In response to another question asked by counsel for Appellant as to whether Ms. Day had a conversation with Ms. Scarlett, regarding whether Ms. Scarlett wanted Appellant to return, Ms. Day responded:

Ms. Scarlett and I had a meeting at the end of the observation, when we both had completed our observations, but before we had we had met at the district level. No, that’s wrong. It was after

the fourth observation. After the fourth observation, because I had to do the interim report, I met with her and we talked about it. And **it was clear to both of us that we were going in different directions**, and I stated **that I had seen growth** that I was moving toward this teacher is making improvement, and I said, What do you want? And she said, I want him gone. (Bold print added)

If Ms. Day is correct in her recollection of the timing of the discussion, then the discussion occurred sometime after Ms. Day's fourth observation on April 21, 2010. As noted above, the class Ms. Day observed on April 21, 2010, was described by **Appellant, at the post-conference, held on April 23, 2010, as a disaster - a bad lesson--because Appellant started with the wrong book. App. ex. 60**

Ms. Day also testified that Appellant's classroom should have been changed to a different location. There is no evidence that, during the probation period, Ms. Day made such a suggestion to Ms. Pritchett. In her "Probation Summary Report One (App. ex. 54) dated March 15, 2010, Ms. Day was more concerned with Appellant controlling his space because of Appellant's open door policy. Ms. Day also noted that Appellant, on March 12, 2010, said: "I need to be selfish. I need to control my own space." No mention was made in the Probation Summary Report One to any change to another classroom in the building.

On cross-examination, Ms. Day testified that she understood the nonrenewal was because of Appellant's "inability to teach the subject CMP2 math". Counsel for the District then asked: " Q. And it is your opinion, your professional opinion, that Mr. Cummings does not have the ability to teach CMP2 math; is that correct. A. That was my opinion, yes."

End of Probation Meeting

On April 26, 2010, Ms. Morris (HR), F. Chess-Prentice (Legal), R. Medsker (Ed. Director), K. Scarlett (AP-Primary Evaluator), S. Pritchett (Principal) and M. Day (2nd Evaluator) had a meeting to determine what recommendation should be made to the

Superintendent regarding Appellant's probation. The report of the meeting is set forth in Res. ex. 19. All but Ms. Day, the 2nd Evaluator, recommended nonrenewal. Res. ex. 19. Ms. Day testified that she attended the meeting but was not given the opportunity to speak, so she left. Res. ex. 19, contains the following statement:

Second evaluator (Marilyn Day) did not agree with AP. K Scarlett's assessment. Did concede that he could not teach subject matter (Math) even though he had a good rapport with students. Second evaluator's last probation summary is attached.

Meeting With Superintendent Prior to Non renewal Letter

After receiving the recommendation of nonrenewal, the Superintendent, by letter dated April 30, 2010, advised Appellant that before making the "extremely important decision" she wanted to give the Appellant the opportunity to tell her anything that Appellant thinks she should "know and consider" before she made her final decision. The meeting was scheduled, and took place, on Thursday, May 6, from 10:30 to 11:15 a.m. in the Superintendent's office. The Superintendent advised Appellant that "If you wish, you are welcome to bring someone to accompany you to this meeting."

From memory, the Superintendent recalled that the Appellant was at the meeting, his SEA representative (unnamed), Ms. Scarlett, and the HR person. The Superintendent did not recall whether Appellant's attorney was present. The Superintendent testified that "the SEA representative did the majority of the talking". The Superintendent took notes of the meeting which she wrote on Res. ex. 21. The Superintendent's notes provides the only record of what the SEA representative said since no SEA representative testified at the hearing. Unfortunately, the notes were not read into the record by the Superintendent and some are not clear. The notes do state that the SEA and the Second Evaluator did not support nonrenewal; that SEA did not think the process was fair because Appellant did not have "content knowledge". A reference to "504 accommodation" will be discussed later. Appellant believed that the purpose of the meeting was for him to "plead" his case. Appellant testified:

We talked about how I had never been. . . put on probation before. I had never received any negative reviews before, and how it didn't seem fair for me to be nonrenewed on the basis of being a math teacher. And that at that time we proposed that I be placed on probation the following year, if necessary, **in a subject that I had more mastery over...** (Bold print added)

Appellant stated that the Superintendent was advised of his contributions to the school, and how he was considered as one of the school leader up to the 2009-2010 school year. They also talked about the methods of teaching and instruction--the goals and objectives of the kids. Appellant believed that the Superintendent would understand what he was talking about because, prior to becoming the Superintendent, **she was a special education teacher.**(Bold print added) Appellant showed the Superintendent letters of recommendation and "evaluations that had been done over the years, and how the only negative about my teaching was coming **from this one person.**" (Bold print added)

As an alternative to nonrenewal, Appellant testified:

. . .we knew there was an opening happening, that Gretchen Nuell was leaving, and I asked to be given the opportunity to step into that position, because that was a position that I was seriously qualified to teach, and even go on probation immediately, if that was the case, that if she agreed to me go into that position.

During her testimony, the Superintendent was not asked whether she recalled Appellant, or his SEA representative, making the request that he be considered as a replacement for Ms. Nuell. Although Ms. Nuell did not formally advise the District, by letter dated June 21 ,2010, that she was resigning effective June 30, 2010, it was well known prior to that time that she was going to resign.

There is no evidence that the Appellant filed an application with the District when the position opened up; whether Appellant was considered for the position; whether the position was filled and, if filled, whether it was filled by a more qualified teacher.

After considering the information presented by Appellant and his SEA representative, the Superintendent determined that nonrenewal was the appropriated decision. See

Res. ex. 21, signed by the Superintendent on May 6, 2010. Her decision was based on a review of the Plan of Improvement and the evaluations submitted by the two evaluators.

Appellant was advised of the Superintendent's decision by letter dated May 10, 2010.

Res. ex. 23.

Ms. Day testified that the Superintendent never contacted her to discuss Ms. Day's reasoning as to why she disagreed with the nonrenewal recommendation of Ms. Scarlett. There is no evidence that Ms. Day requested any meeting with the Superintendent, or that the SEA representative or Appellant suggested to the Superintendent that she meet with Ms. Day prior to making any final decision.

Conclusions of Law and Decision

As the Hearing Officer has stated in other cases, the evidence is what it is. All counsel can do is to present arguments, and cite facts and decisions of the Court of Appeal and the State Supreme Court that they believe support their respective positions. The task of the Hearing Officer is to carefully weigh and consider the evidence, apply the law to the facts and in this way decide the case. This the Hearing Officer has attempted to do in this opinion.

This is the longest and most troubling case, with more issues, the Hearing Officer has heard during the years he has presided at nonrenewal hearings.

The burden on the District is to prove, by a preponderance of the evidence, sufficient cause for the nonrenewal of Appellant's contract. Counsel for the District argues that the District proved Appellant's identified teaching deficiencies in instructional skill and knowledge of the subject matter, for which he was placed on probation, were not remedied during the probationary period because Appellant lacked the content knowledge to teach the District's mandated CMP2 math curriculum, as modified, to accommodate the needs of his special education students in their IEPs. The Hearing Officer must agree. The failure of the Appellant "to demonstrate satisfactory levels of institutional skill and knowledge of

subject matter"²⁰, during his probationary period, constitutes sufficient cause for the nonrenewal.

Ms. Day testified that Appellant is a gifted, special education teacher, but, as Ms. Day also testified, he is not a CMP2 math teacher and that is the basis for the nonrenewal. Ms. Day's opinion that Appellant is a gifted, special education teacher is supported by the evidence. Appellant had great rapport with his students, he was interested in each as an individual, he respected his students and they respected and liked him and were comfortable in his classroom. Appellant was also the teacher other teachers come for advice. Unfortunately, this caused some interruptions either in his classes or his 4th period planning period.

It is unfortunate that the Superintendent did not contact Ms. Day to discuss her recommendation. It is also unfortunate that Ms. Day did not contact the Superintendent before the Superintendent made her decision. There is no evidence that the Superintendent was aware of Ms. Day's background and experience in the District.

Though recognizing Appellant did not have the content knowledge to teach CMP2 math as mandated by the District, Ms. Day did not recommend termination because Appellant was trying but his improvement was minimal. In essence, she was requesting that the Superintendent renew Appellant's contract but have him assigned to special education subjects where he had been successful in the past. That would be Social-Studies, Language Arts and History. The Superintendent declined to follow Ms. Day's recommendation.

Counsel for the District "with respect" argued that the option that the Superintendent had may not be exercised by the Hearing Officer. The Hearing Officer must agree. The statute is clear that if "sufficient cause" is proven for the nonrenewal, the decision of the District must be affirmed.

²⁰ The quoted portion is from the Superintendent's letter of nonrenewal

As stated during the oral argument, a mid-year transfer would have continued the teaching tenure of a gifted special education teacher at McClure and would have provided the students in his special education 6th, 7th and 8th math classes with a competent CMP2 math teacher for the remainder of the year. In addition, the Appellant and the District would have avoided the cost of this lengthy proceeding. But, the record is what it is.

Alleged violations of RCW 28A.405.300, RCW 28A.405.310 and WAC 181-82-110

Counsel for Appellant contends that the District inappropriately listed Appellant as "highly qualified" and then imposed on him in mid-October 2010, a new curriculum, CMP2, and forced him to teach it. Counsel argues that the actions of the District do not comply with due process or the statutory procedure and are a direct violation of WAC 181-82-110.

Counsel for the District argues WAC 181-82-110 (1) is not applicable here because it prescribes exceptions for classroom teacher assignment "in areas other than their endorsed areas". WAC 181-82-110 (1) (b) provides, in part, that a teacher shall not be subject to nonrenewal based on evaluation of their teaching effectiveness **in the out-of-endorsement assignment.**" (Bold print added) Here, counsel contends that Appellant's nonrenewal was based on teaching deficiencies in his area of endorsement, special education, therefore WAC 181-82-110 is inapplicable. The Hearing Officer must agree.

Appellant's Teachers Certificate has a Special Education endorsement of K-12. With such endorsement one of the core subjects he was expected to be able to teach was math. WAC 392-172-01045.²¹ As stated previously, the reason for his nonrenewal was his lack of content knowledge to teach the mandated CMP2 to his special education 6th, 7th and 8th grade math classes. Therefore, the nonrenewal was not based on out of endorsement assignment.

Appellant was determined to be "highly qualified" to teach math by the Housse method. The information on which this determination was made was provided by the

²¹ The Superintendent who was a special education teacher before she became the Superintendent testified that teachers are expected to have the ability to teach special education students K-12, all subjects, including math.

Appellant.

The District did not violate any due process rights of Appellant and did not violate WAC 181-82-110.

Alleged violation of the Individuals With Disabilities Education Act

Counsel for Appellant argues that the District violated the Individuals With Disabilities Education Act of 2004 when it forced Appellant to teach CMP2 math curriculum that was not individualized education for his students.

Counsel for the District contends that Appellant does not have standing and the Hearing Officer does not have jurisdiction to consider such claim. The Hearing Officer must agree.

The remedies available under the IDEA are “to insure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provisions of a free and appropriate education”. *Lake Washington Dist. No 414 v. Office of Superintendent of Public Instruction*. ___F. 3d___, 2011 WL 590297, (C. A. 0 (Wash). See 20 U.S.C. sec .1415. The District Court dismissed the action filed by the Lake Washington District, holding that the district lacked standing under the IDEA to assert the individual rights that belonged only to parents and their children. In affirming the District Court, the Court of Appeals stated:

In sum, we join our sister circuits in holding that a school district or other local educational agency has no express or implied private right of civil action under the IDEA to litigate any question aside from the issues raised in the complaint filed by the parents on behalf of their child. In this case, the school district lacks standing to challenge the State of Washington’s compliance with the IDEA’s procedural protections. The district court correctly dismissed its complaint with prejudice.

See also, *Reid L. v. Illinois State Bd of Educ.* 358 F. 511(7th Cir. 2004)

The cases by counsel for the District establish that Appellant lacks standing and the Hearing Officer lacks jurisdiction to pass on any claimed violation of the IDEA.

Furthermore, the mandatory curriculum that Appellant was required to teach was CMP2, as modified to accommodate the needs of his special education students, as set forth in their IEPs. Appellant was impressed by the middle special education math teacher he observed teaching CMP2 at Madison Middle School, as noted earlier in this opinion.

Conflict of Interest

Counsel for Appellant argues that the District violated Appellant's substantive and procedural due process rights in the probationary period when placing him on probation and in a probationary period when his evaluator / math coach had a clear conflict of interest in performing both roles for Appellant. The Hearing Officer cannot agree. Counsel cites no legal authority in support of this argument.

In his Post-Hearing Brief, counsel states that ". . . John Cummings and former long term Administrator / Principal and Evaluator, Ms. Marilyn Day testified **numerous times** that Keisha Scarlett had a conflict of interest in serving as both John Cummings' math coach and evaluator".(Bold print added) Saying it "numerous times" does not mean it is true. Counsel also stated that "Mr. Cummings testified that he was afraid to discuss items with Keisha Scarlett as his math coach because she would then turn and use them against him in her role as his evaluator." There is no evidence that Ms. Scarlett used anything she learned as a coach to hold it against Appellant. In both roles, Ms. Scarlett was attempting to assist Appellant in reaching a level of satisfactory performance of his teaching as detailed in the Plan of Performance to avoid non-renewal.

On direct examination, counsel asked Ms. Day about Ms. Scarlett serving as both the coach and evaluator. Ms. Day responded:

A. Mr. Cummings continued to express frustration to me that Ms. Scarlett was his primary evaluator, and she was also the building math coach, and that he felt great frustration about her having both those roles, and I also raised that with Ms. Scarlett.

Q. And what was your concern?

A. I raised it with Ms. Scarlett and with Gloria Morris. I said I believed there was a conflict of interest for her to be the primary evaluator and his go to math coach in the building.

Q. And why was that?

A. What I saw happening was that Mr. Cummings would meet with Ms. Scarlett in the role of her being the math coach, and they would talk about lessons, and then it would drop into evaluative, and there was no clear line. If he's supposed to be, through the performance improvement plan, receiving assistance and help from a math coach, that should be clear, in my opinion, and not tainted by the evaluation process.

So **they would sit and develop a lesson, lessons, for him to deliver in the classroom**, which is what one would do as a coach. He would go back to the classroom to deliver that and then **she would sit and observe him not delivering it, and he would get marked down for that**, and I thought that was a conflict of interest.²² (Bold print added)

The Hearing Officer disagrees with Ms. Day's opinion. Based on her reasoning, the Hearing Officer reaches the opposite conclusion. The math coach could only assist Appellant in the delivery of a math lesson, if the lesson, as planned, is observed. Ms. Scarlett, as the evaluator, should have had a copy of the lesson plan and would be in a position to determine if it was delivered as she and Appellant had planned. Her dual roles were not in conflict but should have been of assistance to Appellant in improving his performance and remedying the teaching deficiencies for which he was placed on probation.

Furthermore, Appellant's math coaching was not limited to only Ms. Scarlett. In the Plan for Improvement, Ms. Scarlett advised Appellant that among the support he would

²² Prior to the testimony at the hearing, the only reference to any confusion between Ms. Scarlett acting as the math coach and the primary evaluator is found in Ms. Day's Probation Observation !!! report. App. ex. 59 p.3. On April 6, 2010 at a preconference under "Communications with other Professionals" Ms. Days reports the "Mr. C. says roles **can be confusing** as his primary evaluator is also the math coach and the building principal." (Bold print added)

Later, in the same exhibit, following the Observation on April 8, 2010, Ms. Day noted under "Feedback" *Mr. Cummings is not moving through the CMP materials at the pace he is expected to maintain. I'm thinking that there are several contributing factors:

- o. Planning with the Math coach (2n evaluator) **that falls apart between the planning stage and the actual delivery of the lesson.** (Bold printed added)

receive during probation was that of Ms. Oliviles, the District's math coach. Res. ex. 6 Ms. Day stated that Appellant found the assistance of the District's math coach to be helpful. The record does not disclose how many times Appellant met with the District's math coach.

In her Probation Summary Report One, dated March 14, 2010, (App. ex. 54) a number of references are made to the Math Coach without any suggestion that Ms. Day believed, at that time, that there was a conflict between being the coach and evaluator. In fact, Ms. Day noted under "Teaching for Understanding"

c. Mr. Cummings reports his observation at Madison middle school, and feedback **from both evaluators is helping him.** (Bold print added)

The Hearing Officer does not find any violation of Appellant's substantive or procedural due process rights by having Ms. Scarlett act as his Math Coach and primary evaluator.

504 Information Made known to Superintendent Prior to Nonrenewal

Counsel for Appellant contends that the Superintendent's decision to nonrenew the contract of Appellant was predicated on the erroneous information that Appellant's disability had been accommodated by the District. The Hearing Officer cannot agree. The decision to nonrenew the contract was because Appellant lacked the content knowledge to teach CMP2 math, as modified to accommodate the needs of his special education students as set forth in their IEP's.

As noted previously, the Hearing Officer does not find that Ms. Demetrice Lewis' letter of March 16, 2010, to be a "model of clarity". The writer of the letter testified that the 504 request was denied. On the other hand, the SEA representative believed the 504 request had been granted. The Appellant initially believed his request was denied and only learned at the meeting with the Superintendent that it had been granted. And the several educators and the one attorney who attended the End of Probation meeting, on April 26, 2010, believed that Appellant been granted some accommodations. See, Pro-

bation Summary, dated April 29, 2010. App. ex. 21.

The reason why the Superintendent believed that Appellant had received 504 accommodations is because that is what she was told by the representative of the SEA at the meeting on May 6, 2010.

During cross-examination, the Superintendent testified that "it was mentioned in the meeting (on May 6, 2010) that he had 504 accommodation, by---I think from my notes from the SEA rep." On Res. ex. 21, at the bottom of the page, the Superintendent wrote the following notes:

SEA Recently diagnosed as ADHD (504 accommodation) didn't know he had a 504.. . .

Alleged failure of the District to follow proper procedures

Counsel for the Appellant next argues that the District failed to prove that an essential function of Appellant's job was to teach CMP2. The Hearing Officer cannot agree. The District proved that CMP2 math was to be taught in all schools in the Districts and that Appellant lacked the content knowledge to teach such math. That was the basis for the determination of the Superintendent to nonrenew the contract.

Alleged violation of "RCW 28A.405.100(3) (a)"

Counsel for Appellant contends that Ms. Pritchett, the principal, who concurred in the recommendation of Ms. Scarlett to nonrenew Appellant's contract, violated RCW 28A.405.100 when she observed Appellant's teaching but did not prepare any written document advising Appellant "of alleged deficiency nor did she prepare any written evaluation regarding Mr. Cummings". The Hearing Officer finds no violation. As the principal, Ms. Pritchett visited Appellant's classroom and other classroom to observe the teaching. She observed as the principal not as an evaluator. She agreed with the evaluation of Ms. Scarlett and that is why she concurred in the recommendation of nonrenewal.

Alleged failure of the District to accommodate Appellant's disability -504 Issue

Counsel for Appellant argues that the District's nonrenewal of Appellant was in violation of Washington's Law Against Discrimination. RCW 49.60.180 *et seq*, RCW 49-60.180 (1) and RCW 49.60.180 (2).

Counsel also argues that the District violated the Federal counterpart to RCW 49.60.180, Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. Section 794 which prohibits otherwise qualified handicapped individuals by reason of their handicap from being subjected to discrimination under any program that receives Federal financial assistance. Counsel states that the cited provisions are to be interpreted in accordance with the American With Disabilities Act of 1990 (42 U.S.C. sec. 12111 *et seq.*, sec. 12101 *et seq* through sec. 12117)),

As a result of the failure of the District to provide appropriate accommodation for Appellant's disability, counsel contends, contributed to him "allegedly not successfully passing a probationary period."

Article V111, section I of the Collective Bargaining Agreement (Res. ex. 1, p.78) applies to "employees covered under section 504. . ." It reads as follows:

The SPS shall comply with Section 504 of the Rehabilitation Act of 1973 when placing or transferring employees. In addition to the selection rights of all employees during the year, Human Resources will assign employees **covered under 504** who require transfers or adjustment of their assignments to an available position within the same job title for which the employee will be able to perform the essential functions, with or without reasonable accommodations. This placement will be made based on the judgment of the Human Resources staff responsible for the 504 accommodation and will be aligned with the details of the approved 504 accommodation
(Bold print added)

Appellant in his letter of January 30,2010, advised the Superintendent that he had been diagnosed, in November 2009, by a psychologist, as having ADHD. He advised that the medicine he started over the winter break "doesn't help with everything which is why I am pursuing accommodation under 504 b." Appellant did not request a transfer but

requested that the Superintendent reverse her decision on probation and allow him to finish out the year with his "kids and then move to one of the schools in the south end or central district where I can be of most useful. I would have been an excellent fit for the Washington Middle School position that had opened up a month or so back. I am an excellent SP. ed. LA/ SS teacher."

While the Superintendent did not respond to Appellant's letter, the letter somehow found it's way to the Human Resources Department. Senior Human Resources Analyst Demetrice Lewis responded to Appellant's 504 request, on February 3, 2010 by asking Appellant to have his medical provider complete a Request for Medical Information form. Ms. Lewis testified that she also sent him the "job description for both him and his medical provider." On page 8 of Res. ex. 35, the job description states:

Required Knowledge , Skills and Abilities

Knowledge of: Subject areas appropriate to assignment.

Ms. Lewis contacted Appellant on February 23, 2010, after Appellant failed to respond to her February 3, 2010 e-mail. Appellant provided the Request for Medical Information form signed by his provider, Dr. Snyder, on March 8, 2010. The form does not provide a diagnosis but merely stated that Appellant had a "disability", that the disability was "long term" and that Dr. Snyder believed that Appellant could perform all the functions of the position with "accommodations" . Res. ex. 35A

The District responded to Appellant's 504 request by letter dated March 16, 2010. App. ex. 21. The letter does not expressly state that the District denied the request except for Appellant's request for a clerk. However, Ms. Lewis testified the request was denied and that is how the Appellant understood it. The letter reads as follows:

The District has reviewed your 504 Request for Accommodation and the medical information provided by your health provider in order to make a determination about what accommodation is reasonable and appropriate with with respect to your medical condition.

You and your medical provider requested the following accommodations:

- * Training in the use of software that we use such as Easy Grade Pro, Outlook, The Source (posting to it)
- * Some clerical support to implement and maintain records and assistance setting up and maintaining an organized filing system.
- * Large projects broken down into smaller steps.
- * Checklists to structure tasks that require many steps.
- * Excuse me from non-essential tasks to allow more time on essential tasks.
- * Establish multiple short-term deadlines
- * Assistance with setting priorities.
- * If possible, set up Outlook to filter out e-mails that are not essential
- * Assistance with organization-organization of grade book, planner, projects, etc.
- * 1 1/2 normal time-time management.

You have been provided with a consulting teacher [Drew Dillhunt] who is currently assisting you with obtaining skills that can help with time management and organization. These skills will also assist you in the following areas:

- * Support in implementing and maintaining records and assistance setting up and maintaining an organized filing system.
- * Large projects broken down into smaller steps.
- * Checklists to structure tasks that required many steps.
- * Establish multiple short term deadlines
- * Assistance with setting priorities.

In addition, the training on the use of software used by the district such as Easy Grade Pro, Outlook, The Source and Outlook is available to all certified staff. Please go to: . . .

The Seattle School District does not provide clerical support for teachers. Therefore, the District cannot reasonably accommodate your request for **“clerical support to implement and maintain records and assistance setting up and maintaining an organized filing system” under 504 is denied.**

Should the physical requirement of your current position change or you feel you are not able to perform the essential functions of your job please contact Evelyn Lutz in the HR Department. . . . or to make the appropriate request for a medical / health leave of absence. **You are also welcome to apply for any open positions within the District that you believe would meet your needs.** If you have any questions or concerns, please do not hesitate to contact me. . . .
(Bold print added.)

Appellant looked to Drew Hillhunt for assistance with “Outlook”. He did not seek further advice or assistance from him because, as the Appellant testified, he was “pretty

overbooked as ti was.”

The District did not grant Appellant's 504 request in part because the District was already providing Appellant assistance in each of the areas requested under the PIP. Counsel also argues the District denied Appellant's request for a clerk because the District does not have the resources to provide clerical support for “each of its 3,300 teachers.” The Hearing Officer cannot agree with the reasoning of the District on the “clerk issue”. If a clerk would have assisted him in his ability to teach CMP2, a clerk should have been provided. Granting such request would not have required the District to provide clerks to all other teachers in the District. However, if the Appellant did not have time to meet with Mr. Dillhunt for additional assistance, the Hearing Officer does not believe he would have had the time to successfully use a “clerk”. More importantly, the services of a clerk would not have assisted Appellant in teaching CMP2 math, because Appellant lacked the content knowledge

The evidence establishes that Appellant has a disability, ADHD. The question here is whether such disability required accommodation by the District. under the Law Against Discrimination, Chapter 49.60 RCW. RCW 49.60.040 (7)(d)(i) and(ii) provide, as follow:

- (d) Only for the purpose of **qualifying for reasonable accommodation in employment**,, an impairment must be known and shown through an interactive process to exist in fact and:
 - (i) The impairment must have **a substantially limiting effect upon the individual's ability to perform his or her job**, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or condition of employment; or
 - (ii) The employee must have put the employer on notice of the existence of an impairment, and **medical documentation must establish a reasonable that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.**

Counsel for the District argues that ADHD was not an impairment that had a “substantially limiting effect” upon Appellant “ability to perform his job”, that Appellant's ADHD did not create or cause his lack of content knowledge, that his ability to teach math was limited only by his lack of content knowledge and not by his ADHD, that ADHD was not a

substantially limiting factor in Appellant's ability to deliver the District's mandated CMP2 math curriculum and therefore, Appellant's ADHD does not qualify for a reasonable accommodation as a matter of law.

Not surprisingly, counsel for the Appellant contends that Appellant was qualified to perform the essential functions of the job as a special education teacher with or without accommodation. As stated previously, the evidence, particularly the testimony of Ms. Day establishes that Appellant is a "gifted special education teacher" in teaching subjects other than CMP2 math. The Hearing Officer finds that the nonrenewal of Appellant's contract was not because he has ADHD. Because of lack of "content knowledge" he was not able to teach the mandated CMP2 math to his 6th, 7th, 8th grade special education students and to modify it to accommodate the needs of his special education students as stated in their IEPs.

The Hearing Officer must agree with counsel for the District that where Appellant has failed to show a qualifying impairment, there is no duty to accommodate. The case of *Clarke v. Shoreline School Dist.* 106 Wn 2d 102, 720 P.2d 793 ((1986) is distinguishable on its facts.

Even if the Hearing Officer were to consider, for the sake of argument, that Appellant qualified for the accommodation he requested from the District, such accommodation would not have enabled him to teach CMP2 math. Appellant's witnesses, Dr. Snyder, Appellant, himself, and Ms. Day agree.

Dr. Snyder testified that Appellant's diagnosis of ADHD did not contribute to or cause his lack of knowledge in math or his failure to deliver the District's math curriculum. Counsel for the District asked Dr. Snyder the following questions:

Q. . . .Do you have an opinion as to whether or not Mr. Cummings could teach the math curriculum that was required by the Seattle Public Schools?

A. No

Q. Let me ask you the question again. Your recommendation for accommodations did not address, specifically, whether or not Mr. Cummings needed accommodations. in order to teach math to middle school students?

A. That's correct. It does not address that directly.

Q. . . So, if in this case, Mr. Cummings had a sufficient content knowledge of math prior to your diagnosis of ADHD, your diagnosis would not remove that content knowledge?

A. That's correct.

Q. And so if I am correct then, these bullet points that are contained in Exhibit No. 21, at least in your mind, did not have anything to do with whether or not Mr. Cummings could teach math?

A. That's correct.

Counsel for the District also asked Appellant his ability to teach math if all the accommodations he asked for were provided by the District.

During his deposition, Appellant was asked by counsel for the District::

So even if the District provided you with all of the assistance that you requested, you are still of the opinion that you would not have been able to teach CMP2 math curriculum to your classes, is that correct.

A. The accommodations that I asked for or that is supposedly got would have helped me in general be less dependent on others. **Whether or not that would have suddenly given me math skill that I didn't possess, obviously, not.**

Again referring to Appellant deposition, counsel for the District asked whether the Appellant would agree that the accommodations would not have given Appellant sufficient math skills that would have allowed him to teach CMP2. Appellant answered "That would be like a magic pill. The math skills that I was expected to have to teach CMP, I didn't have."

During the hearing, counsel for the District asked Appellant:

Q. So your're testimony before the Hearing Officer here today is that you did not have the math skills to teach CMP2 to your students, correct?

A. I did not have the math skill to deliver the curriculum the way it is designed to the students.

On cross-examination, counsel; for the District asked Ms. Day

Q. And it is your opinion, your professional opinion, that Mr. Cummings does not have the ability to teach CMP2, is that correct?

A. That was my opinion , yes.

Later in the cross-examination, counsel for the District asked Ms. Day whether she could “ imagine any accommodation under any circumstances that would give Mr. Cummings the ability to teach CMP2 math to his students. ..?

A. Given that Mr. Cummings did not have an endorsement the only accommodation I can think of that would have worked **would have been for a qualified math teacher to write the curriculum out for him, so that he could deliver it** in a prescriptive lockstep manner, and that still would not account for all the student absences and the off task behavior, so that’s the only accommodation I can think of.

Q. So your’re saying the Seattle School District would have to hire two teachers for that classroom, one to write out the curriculum for Mr. Cummings?

A. . . . your asked me could I think of an accommodation, and I **know it’s ridiculous one**, but that’s the only one I could think of. (Bold print added.

Based on the evidence the Hearing Officer cannot agree with counsel for the Appellant that the District violated the Washington Law Against Discrimination or any Federal statute.

There is also one other issue relating to Appellant’s 504 request. As quoted above, Ms. Lewis ,in her letter of denial, advised Appellant that he was welcome “to apply for any open positions within the District that you believe would meet your needs.. .” The invitation to apply implies the District’s willingness to consider the application. Since the 504 was provided in the Collective Bargaining Agreement, it carries with it the covenant of good faith and fair dealing.

There is no evidence that Appellant filed an application to fill the position formerly held by Ms. Nuell. Appellant did, however, apply for two advertised positions within

the District for which he was qualified, in fact, and not simply, on paper, by the numbers. One of the teaching positions was at Child Ryther Center and the other one was as a science materials assistant position. The applications were not made a part of the record until the second to last day of the hearing, December 14, 2011. There is no evidence as to whether the District considered the applications, and if considered, were the positions filled by more qualified applicants. Counsel for the District is correct that the Hearing Officer does not have the authority to order the District to consider applications by Appellant. The District through Ms. Lewis invited Appellant to submit such applications implying that the District would consider them.

Alleged violation of the Collective Bargaining Agreement

Counsel for Appellant contends that the District violated Article III, section E, 5, of the Collective Bargaining Agreement (Res. ex. 1 p.28) when it forced Appellant to teach CMP2 math to his special education students. Neither of the contracting parties, the District or the SEA testified as to the meaning of

5. No single instructional philosophy or technique is prescribed by the SPS for the instruction of a Special Education Student.

The representative of the SEA who represented Appellant at the May 6, 2010, meeting never raised the issue.

Counsel for appellant argues that Appellant's a "duty and obligation under his special education licensing and endorsement by the State of Washington as a special education teacher requires him to teach special education students based on their Individual Education Programs or IEPs." The Hearing Officer agrees. However, the CMP2 math he was required to teach was to be modified to accommodate the needs of his special education students as set forth in their IEPs. Appellant was impressed by how well the special education teacher at Madison Middle School taught CMP 2 math. (App. ex. 58) In the March 10, 2010 Probation Observation of Ms. Day, she said she asked Appel-

lant "his current view of CMP for special education students and he said he was moving toward liking the text, but reserving his final judgment. . . ." Unfortunately, Appellant was not able to make the observation at Denny Middle school because no substitute teacher was available. Obviously, CMP2 Math was being taught successfully in other middle schools in the District.

It is a rule of contract interpretation that the meaning of terms used in the contract may be determined by reading the agreement as a whole. Section E of the Agreement entitled "Academic Freedom" contains two other relevant provisions:

1. . . . The freedom must be unrestricted except as it conflicts with the basic responsibility to utilize properly the current SPS authorized **course of study** and SPS rules and regulations which **each member of the profession must accept**.

3. The professional staff shall assist in designing **the curriculum** in conformity with the laws of Washington and the rules and regulations of the Stated Board of Education. (Bold print added)

Appendix H to the Agreement (p.1260) entitled "Teachers Responsibilities" cites WAC 180-44-010 which is entitled "Responsibilities Related to Instruction",

(1) It shall be the responsibility of the teacher to follow the **prescribed course of study**. . . (Bold print added)

If the parties to the Agreement intended that every special education teacher was to be given the authority to depart from the District's "curriculum" or "course of study", the Agreement would have clearly such intent.

The Hearing Officer finds no violation of the cited provision in the Collective Bargaining Agreement.

Conclusion

This was a long and exhausting proceeding for the parties, counsel and the Hearing Officer. Based on the evidence the Hearing Officer must find that the District proved "sufficient cause" for the nonrenewal of Appellant's contract. The Hearing Officer does not find any violations which would permit him to hold otherwise. At the meeting with the

Superintendent on May 6, 2010, the representative of the SEA told the Superintendent it would not be **fair** for the District to nonrenew Appellant's contract under the circumstances shown in this proceeding. Suffice to say, **if fairness** was the standard by which the Hearing Officer was to decide this case, the outcome would have been different.

As the Hearing Officer stated at the conclusion of the hearing, the parties would receive his honest and best judgment in deciding this case. The views expressed herein represent my honest and best judgment based upon the evidence presented and the application of the controlling law.

Dated this 2nd of May 2011



Robert J. Doran
Statutory Hearing Officer.

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Cummings, John vs. Seattle School District
Reference No. 1160017897

I, Michele Wilson, not a party to the within action, hereby declare that on May 12, 2011 I served the attached Memorandum of Opinion, Findings of Fact and Conclusions of Law and Decision on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Seattle, WASHINGTON, addressed as follows:

Kevin Peck Esq.
1423 Western Ave
Seattle, WA 98101-2021
Phone: 206-382-2900
kpeck@thepecklawfirm.com

Gregory Jackson Esq.
Freimund, Jackson, Tardif, et al
711 Capitol Way S.
Suite 602
Olympia, WA 98501
Phone: 360-534-9960
GregJ@fjtlaw.com

I declare under penalty of perjury the foregoing to be true and correct. Executed at Seattle,

WASHINGTON on ~~on~~ May 12, 2011.


Michele Wilson
mwilson@jamsadr.com

No. 68519-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN CUMMINGS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

APPENDIX C
TO
APPELLANT'S OPENING BRIEF

RCW 28A.405.340

Adverse change in contract status of certificated employee, including nonrenewal of contract — Appeal from — Scope.

Any appeal to the superior court by an employee shall be heard by the superior court without a jury. Such appeal shall be heard expeditiously. The superior court's review shall be confined to the verbatim transcript of the hearing and the papers and exhibits admitted into evidence at the hearing, except that in cases of alleged irregularities in procedure not shown in the transcript or exhibits and in cases of alleged abridgment of the employee's constitutional free speech rights, the court may take additional testimony on the alleged procedural irregularities or abridgment of free speech rights. The court shall hear oral argument and receive written briefs offered by the parties.

The court may affirm the decision of the board or hearing officer or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the employee may have been prejudiced because the decision was:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the board or hearing officer; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
- (6) Arbitrary or capricious.

[1975-'76 2nd ex.s. c 114 § 6; 1969 ex.s. c 34 § 15; 1969 ex.s. c 223 § 28A.58.480.
Prior: 1961 c 241 § 5. Formerly RCW 28A.58.480, 28.58.480.]

Notes:

Savings -- Severability -- 1975-'76 2nd ex.s. c 114: See notes following RCW 28A.400.010.

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Respondent.

APPENDIX D
TO
APPELLANT'S OPENING BRIEF

RCW 28A.405.310

Adverse change in contract status of certificated employee, including nonrenewal of contract — Hearings — Procedure.

(1) Any employee receiving a notice of probable cause for discharge or adverse effect in contract status pursuant to RCW 28A.405.300, or any employee, with the exception of provisional employees as defined in RCW 28A.405.220, receiving a notice of probable cause for nonrenewal of contract pursuant to RCW 28A.405.210, shall be granted the opportunity for a hearing pursuant to this section.

(2) In any request for a hearing pursuant to RCW 28A.405.300 or 28A.405.210, the employee may request either an open or closed hearing. The hearing shall be open or closed as requested by the employee, but if the employee fails to make such a request, the hearing officer may determine whether the hearing shall be open or closed.

(3) The employee may engage counsel who shall be entitled to represent the employee at the prehearing conference held pursuant to subsection (5) of this section and at all subsequent proceedings pursuant to this section. At the hearing provided for by this section, the employee may produce such witnesses as he or she may desire.

(4) In the event that an employee requests a hearing pursuant to RCW 28A.405.300 or 28A.405.210, a hearing officer shall be appointed in the following manner: Within fifteen days following the receipt of any such request the board of directors of the district or its designee and the employee or employee's designee shall each appoint one nominee. The two nominees shall jointly appoint a hearing officer who shall be a member in good standing of the Washington state bar association or a person adhering to the arbitration standards established by the public employment relations commission and listed on its current roster of arbitrators. Should said nominees fail to agree as to who should be appointed as the hearing officer, either the board of directors or the employee, upon appropriate notice to the other party, may apply to the presiding judge of the superior court for the county in which the district is located for the appointment of such hearing officer, whereupon such presiding judge shall have the duty to appoint a hearing officer who shall, in the judgment of such presiding judge, be qualified to fairly and impartially discharge his or her duties. Nothing herein shall preclude the board of directors and the employee from stipulating as to the identity of the hearing officer in which event the foregoing procedures for the selection of the hearing officer shall be inapplicable. The district shall pay all fees and expenses of any hearing officer selected pursuant to this subsection.

(5) Within five days following the selection of a hearing officer pursuant to subsection (4) of this section, the hearing officer shall schedule a prehearing conference to be held within such five day period, unless the board of directors and employee agree on another date convenient with the hearing officer. The employee shall be given written notice of the date, time, and place of such prehearing conference at least three days prior to the date established for such conference.

(6) The hearing officer shall preside at any prehearing conference scheduled pursuant to subsection (5) of this section and in connection therewith shall:

(a) Issue such subpoenas or subpoenas duces tecum as either party may request at that time or thereafter; and

(b) Authorize the taking of prehearing depositions at the request of either party at that time or thereafter; and

(c) Provide for such additional methods of discovery as may be authorized by the civil rules applicable in the superior courts of the state of Washington; and

(d) Establish the date for the commencement of the hearing, to be within ten days following the date of the prehearing conference, unless the employee requests a continuance, in which event the hearing officer shall give due consideration to such request.

(7) The hearing officer shall preside at any hearing and in connection therewith shall:

(a) Make rulings as to the admissibility of evidence pursuant to the rules of evidence applicable in the superior court of the state of Washington.

(b) Make other appropriate rulings of law and procedure.

(c) Within ten days following the conclusion of the hearing transmit in writing to the board and to the employee, findings of fact and conclusions of law and final decision. If the final decision is in favor of the employee, the employee shall be restored to his or her employment position and shall be awarded reasonable attorneys' fees.

(8) Any final decision by the hearing officer to nonrenew the employment contract of the employee, or to discharge the employee, or to take other action adverse to the employee's contract status, as the case may be, shall be based solely upon the cause or causes specified in the notice of probable cause to the employee and shall be established by a preponderance of the evidence at the hearing to be sufficient cause or causes for such action.

(9) All subpoenas and prehearing discovery orders shall be enforceable by and subject to the contempt and other equity powers of the superior court of the county in which the school district is located upon petition of any aggrieved party.

(10) A complete record shall be made of the hearing and all orders and rulings of the hearing officer and school board.

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APPENDIX E
TO
APPELLANT'S OPENING BRIEF

RCW 28A.405.100

Minimum criteria for the evaluation of certificated employees, including administrators — Procedure — Scope — Models — Penalty.

(4)(a) At any time after October 15th, an employee whose work is not judged satisfactory based on district evaluation criteria shall be notified in writing of the specific areas of deficiencies along with a reasonable program for improvement. During the period of probation, the employee may not be transferred from the supervision of the original evaluator. Improvement of performance or probable cause for nonrenewal must occur and be documented by the original evaluator before any consideration of a request for transfer or reassignment as contemplated by either the individual or the school district. A probationary period of sixty school days shall be established. The establishment of a probationary period does not adversely affect the contract status of an employee within the meaning of RCW 28A.405.300. The purpose of the probationary period is to give the employee opportunity to demonstrate improvements in his or her areas of deficiency. The establishment of the probationary period and the giving of the notice to the employee of deficiency shall be by the school district superintendent and need not be submitted to the board of directors for approval. During the probationary period the evaluator shall meet with the employee at least twice monthly to supervise and make a written evaluation of the progress, if any, made by the employee. The evaluator may authorize one additional certificated employee to evaluate the probationer and to aid the employee in improving his or her areas of deficiency; such additional certificated employee shall be immune from any civil liability that might otherwise be incurred or imposed with regard to the good faith performance of such evaluation. The probationer may be removed from probation if he or she has demonstrated improvement to the satisfaction of the principal in those areas specifically detailed in his or her initial notice of deficiency and subsequently detailed in his or her improvement program. Lack of necessary improvement during the established probationary period, as specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause under RCW 28A.405.300 or 28A.405.210.

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APPENDIX F
TO
APPELLANT'S OPENING BRIEF

WAC 181-82-110

Exceptions to classroom teacher assignment policy.

Exceptions to the classroom teacher assignment policy specified in WAC 181-82-105 shall be limited to the following:

(1) Upon determination by school districts that teachers have the competencies to be effective teachers in areas other than their endorsed areas, individuals with initial, residency, endorsed continuing, or professional teacher certificates who have completed provisional status with a school district under RCW 28A.405.220 may be assigned to classes other than in their areas of endorsement. If teachers are so assigned, the following shall apply:

(a) A designated representative of the district and any such teacher so assigned shall mutually develop a written plan which provides for necessary assistance to the teacher, and which provides for a reasonable amount of planning and study time associated specifically with the out-of-endorsement assignment;

(b) Such teachers shall not be subject to nonrenewal or probation based on evaluations of their teaching effectiveness in the out-of-endorsement assignments;

(c) Such teaching assignments shall be approved by a formal vote of the local school board for each teacher so assigned; and

(d) The assignment of such teachers for the previous school year shall be reported annually to the professional educator standards board by the employing school district as required by WAC 180-16-195. Included in the report shall be the number of teachers in out-of-endorsement assignments and the specific assistance being given to the teachers.

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APPENDIX G
TO
APPELLANT'S OPENING BRIEF

RCW 28A.405.350

Adverse change in contract status of certificated employee, including nonrenewal of contract — Appeal from — Costs, attorney's fee and damages.

If the court enters judgment for the employee, and if the court finds that the probable cause determination was made in bad faith or upon insufficient legal grounds, the court in its discretion may award to the employee a reasonable attorneys' fee for the preparation and trial of his or her appeal, together with his or her taxable costs in the superior court. If the court enters judgment for the employee, in addition to ordering the school board to reinstate or issue a new contract to the employee, the court may award damages for loss of compensation incurred by the employee by reason of the action of the school district.

[1990 c 33 § 399; 1975-'76 2nd ex.s. c 114 § 7; 1969 ex.s. c 34 § 16; 1969 ex.s. c 223 § 28A.58.490. Prior: 1961 c 241 § 6. Formerly RCW 28A.58.490, 28.58.490.]

Notes:

Savings -- Severability -- 1975-'76 2nd ex.s. c 114: See notes following RCW 28A.400.010.

COURT OF APPEALS
STATE OF WASHINGTON
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No. 68519-8-I

COURT OF APPEALS, DIVISION I
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JOHN CUMMINGS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2012, the original of Appellant's Opening Brief with Appendices was caused to be filed with the Court of Appeals, Division I, via hand delivery to the Court Administrator/Clerk's Office.

I further caused to be served on Respondent's counsel a copy of the Appellant's Opening Brief with Appendices and a copy of the King County Superior Court Record of Proceedings hearing held on February 17, 2012 to be delivered via Legal Messenger on August 28, 2012 to:

Mr. Gregory E. Jackson, Esq.
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501

Dated this 28th day of August, 2012.


Beverley Thomas, Legal Assistant
to Kevin A. Peck